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No. 826

IN THE
Supreme Court of the United States.

WASHINGTON RAILWAY AND ELECTRIC COM-
PANY, PETITIONER,

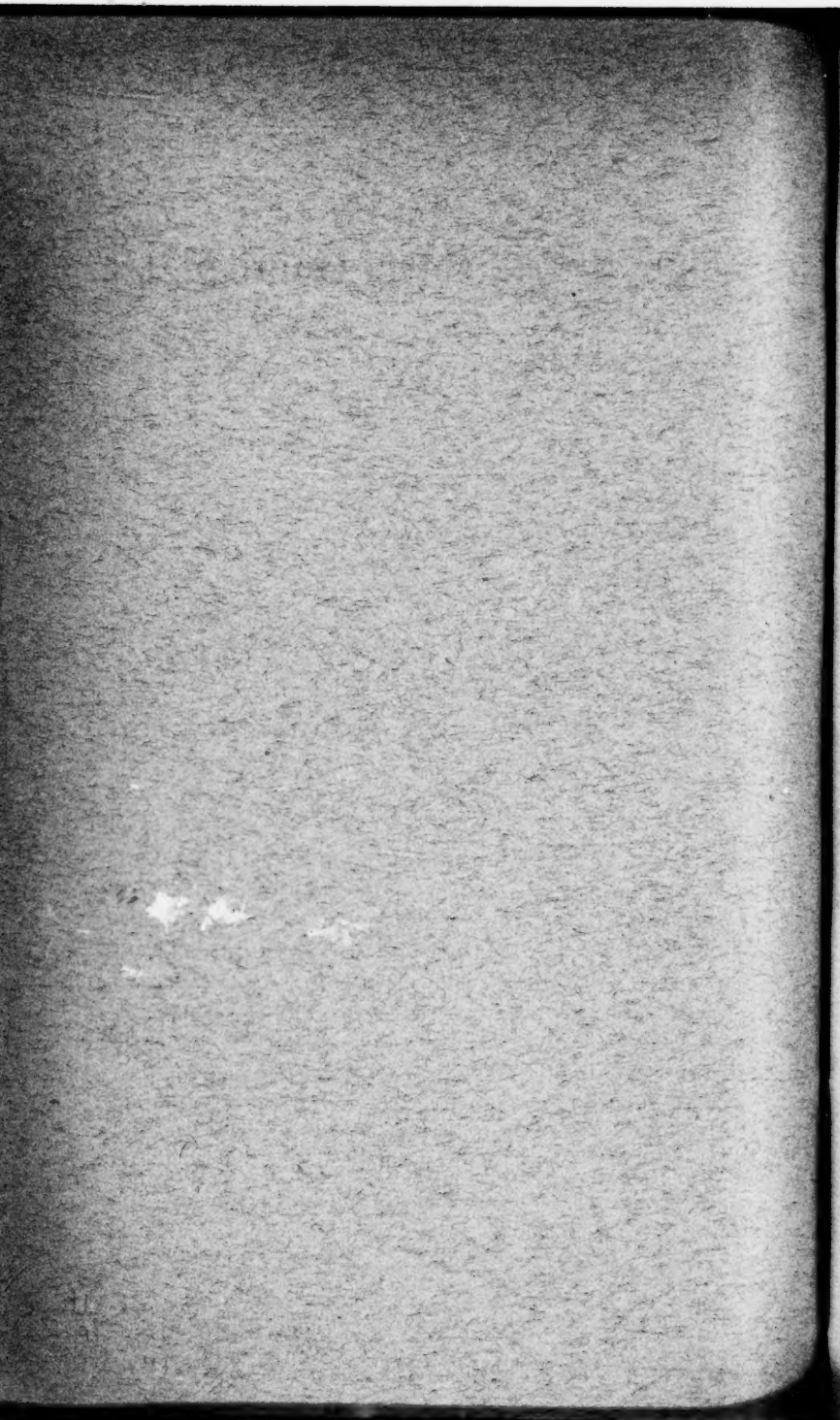
vs.

ANN CATHERINE SCALA, ADMINISTRATRIX
OF THE ESTATE OF ALVIN JOSEPH SCALA,
DECEASED, RESPONDENT.

Petition for Writ of Certiorari.

WASHINGTON RAILWAY AND
ELECTRIC COMPANY,
By Counsel.

Attorney for Petitioner.



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WASHINGTON RAILWAY AND ELECTRIC COM-
PANY, PETITIONER,

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ANN CATHERINE SCALA, ADMINISTRATRIX
OF THE ESTATE OF ALVIN JOSEPH SCALA,
DECEASED, RESPONDENT.

Petition for Writ of Certiorari.

*To the Honorable Judges of the Supreme Court of the
United States:*

Your Petitioner, the Washington Railway and Electric Company, respectfully prays that a writ of certiorari issue to the Court of Appeals of the District of Columbia, to review a certain final judgment of the said court rendered on the 4th day of December, 1916, on a certain appeal prosecuted by your Petitioner from a final judgment of the Supreme Court of the District of Columbia in a certain action at law, wherein your Petitioner was the defendant and the Respondent was the plaintiff, and in which a judgment for \$7,500 had been rendered against your Petitioner and in favor of the Respondent. In the Court of Appeals your Petitioner was appellant and the Respondent was appellee.

The action arose under the Federal Employers' Liability Act of April 22, 1908 (35 Stats. L., 65). The

Respondent's decedent while a conductor in the employ of your Petitioner was in charge of a trolley car operating between the city of Washington, in the District of Columbia, and Glen Echo Park, in the County of Montgomery, State of Maryland, and was killed by his coming in contact with a trolley pole alleged to have been negligently left in dangerous proximity to the track and the car of your Petitioner thereon. The accident occurred on July 18, 1913. The decedent survived the injury but thirty minutes, and died without having regained consciousness. The action was instituted on the 27th day of January, 1914. The declaration as originally filed made no claim for conscious pain and suffering on the part of the decedent, and only claimed pecuniary damages resulting to the next of kin for whose benefit it was instituted. In October, 1915, more than two years after the accident, and during the progress of the trial, the declaration was amended so as to allege and seek a recovery for conscious pain and suffering. The defenses were:

- (1) That the defendant, a street car company purely, not engaged in the transportation of freight of any kind, was not a "common carrier by railroad" within the meaning of the Federal Employers' Liability Law of 1908;
- (2) The entire absence of any negligence on its part;
- (3) That the death of the decedent was caused by his sole negligence;
- (4) That it was the result of an accident, to wit: his losing his footing while passing along the runningboard;
- (5) That the risk of such injury was assumed;
- (6) That as to the conscious pain and suffering.
 - (a) That the evidence did not show that he had undergone conscious pain and suffering;
 - (b) That the statute of limitations barred such a claim before the declaration asserting it was amended.

The evidence showed without contradiction that the condition complained of was a permanent and obvious one; that the decedent had been in the employ of the defendant for over twelve months, and had been over this route repeatedly and in excess of 150 times within a month or two of his death; that the proximity of the pole did not cause him to fall, but that he lost his footing on the runningboard of the open summer car before reaching the pole, which caused his body to swing far beyond the outside of the car, thus causing his body to strike the pole and throw him from the car.

The Court refused to direct the jury to return a verdict on the ground of assumption of risk or that defendant was not a common carrier by railroad, and refused prayers submitting those questions to the jury; granted prayers allowing recovery for conscious pain and suffering of decedent, as well as pecuniary loss to the beneficiaries, and directed the jury as matter of law that if the pole was *dangerously* near the track the plaintiff was entitled to a recovery. The jury returned a verdict for the plaintiff for \$7,500 in solido, though the decedent was but 19 years of age and was earning gross but \$60 per month.

It will be seen that this case necessarily involved the construction of the first, third and fourth sections of the Federal Employers' Liability Act of 1908, and sections six and nine of the Amendatory Act of 1910.

It is the confident contention of your Petitioner that the Employers' Liability Law of 1908 is a general statute and that the Petitioner is entitled as of right to a writ of error bringing this case to this court for review. An application for such a writ was duly made to the Court of Appeals of the District of Columbia and was granted by that Court, and the case is now on the docket of this Court in accordance therewith. Counsel for the Respondent, however, appeared in the Court of Appeals

of the District of Columbia after the said writ of error had been granted and filed a suggestion for the revocation of the order allowing the writ, upon the ground that though it appeared from the evidence in the case that the decedent was engaged on an interstate trip at the time of his injury, yet at the instant of the injury he was within the territorial limits of the District of Columbia and that therefore the right of action accrued under Section 2 of the Act independent of Section 1, and that therefore the writ of error did not lay because "when the injury involved occurs within the territorial limits of the District of Columbia under Section 2 of the Act of 1908," the construction of a local law applying to the District of Columbia alone is involved, and not a "general law of the United States within the meaning of the 6th clause of the Judicial Code."

This view of the law is deemed untenable by your Petitioner as will be hereafter indicated, and this Petition is merely presented out of an abundance of caution. Assuming, however, for the purposes of this Petition, that the statute as applicable to the facts stated in the declaration and shown in evidence is a local law "within the meaning of the 6th clause of the Judicial Code," it is urged that a writ of certiorari should be granted in the instant case, (1) because it involves not only the construction of Section 1 of the Act of April 22, 1908, but Section 2 as well; to wit, whether or not a street railway company such as the defendant is shown to be, is a "common carrier by railroad" within the meaning of the Act of April 22, 1908. The language of both sections in that regard is identical and subject to but one construction as to the character of carriers affected. The trial court and the Court of Appeals both held that your Petitioner was "a common carrier by railroad" within the meaning of that Act, contrary to the holding of this Court in *Omaha & Council Bluffs St. Ry. Co. vs. Inter-*

state Commerce Commission, 230 U. S., 324. (2) It involved also the construction of Sections 3 and 4 of the Act of April 22, 1908, which are undoubtedly general statutes in language, scope and purpose, and can receive but one proper construction whether applicable to cases arising under Section 1 or under Section 2 of the Act of 1908, and therefore make it incumbent on this Court to give them that authoritative and final construction which it alone can give. The only way that such a construction can be ascertained and enforced under the conditions assumed, is by this Court taking jurisdiction by certiorari, if necessary, and reviewing the construction placed on these sections by the Court of Appeals of the District of Columbia in the instant case.

The same is true as to Sections 6 and 9 of the Amendatory Act of April 5, 1910 (36 Stats. L., 291).

It would be intolerable if the Court of Appeals of the District of Columbia should be permitted under the guise of construing Section 2 as a purely local statute to put a construction on all the other sections of that Act different from that recognized by this Court, and further, that such misconstruction should be beyond the control of this Court and subject to but one construction as to the character of carriers affected.

The trial court and the Court of Appeals of the District of Columbia both held that the institution of the original suit, though no claim was there made for conscious pain and suffering of the decedent, stopped the running of the statute of limitations as to that claim which accrued instantly to the decedent before his death, as well as to the right of action given by the Act originally for the benefit of the next of kin alone, and which did not and could not accrue to any one until after his death, thereby holding that the right of action made to survive under Section 9 was identical with the right of action given under Sections 1 and 2 originally for the

benefit of the next of kin, contrary to the holding of this Court in *Michigan Central Railroad vs. Vreeland*, 227 U. S., 59; *St. Louis, Iron Mountain & Southern R. Co. vs. Craft*, 237 U. S., 648; *Garrett vs. L. & N. R. Co.*, 235 U. S., 308.

Of course if this Court holds that the writ of error granted by the Court of Appeals of the District of Columbia which brought this case to this Court was properly granted, then this Petition could well be refused; and as heretofore stated, it is only through an abundance of caution and to preserve the right of this Court to review the judgment, if it holds that the writ of error was improperly awarded, that this Petition is presented.

Counsel for the Respondent, in resisting the application of your Petitioner for the writ of error when applied for, cited but two cases to support their contention; to wit, *American Security & Trust Co. vs. District of Columbia*, 224 U. S., 491; *Wash., Alex. & Mt. Vernon R. Co. vs. Downey*, 236 U. S., 190. The former case involved a purely local statute and can have no application to the instant case. The latter case arose under the First Employers' Liability Act of 1906, which had previously been declared unconstitutional as to the States, but constitutional as to the District of Columbia. This Court held that it thereby became a local statute purely and not a general statute. The present Chief Justice, advertng to this feature of the case, said (p. 193):

"While the transit in which the train was engaged was not purely local, the accident complained of occurred within the confines of the District of Columbia, and the statute became applicable concerning it because, *as a local statute, it governed in the absence of legislation by Congress of a general character governing the subject.* *Chicago, M. & St. P. R. Co. vs. Solan*, 169 U. S., 133, 42 L. Ed., 688, 18 Sup. Ct. Rep., 289; *Pennsylvania*

R. Co. *vs.* Hughes, 191 U. S., 477, 48 L. Ed., 268, 24 Sup. Ct. Rep., 132; *Martin vs. Pittsburgh & L. E. R. Co.*, 203 U. S., 284, 51 L. Ed., 184, 27 Sup. Ct. Rep., 100, 8 Ann. Cas., 87. To take jurisdiction, therefore, we would be compelled to decide that a purely local statute which would be void if it were general in character was yet operative in such aspect, and that because a local law was applicable to a given situation solely for the reason that there was not general law to control, the local law was a general law."

There is, however, no room for such a contention in the present case. It is true that Section 2 applies to "common carriers by railroad within the District of Columbia," but it also applies to "common carriers by railroad within the territories, the Panama Canal Zone, and other possessions of the United States." So that, it is not strictly local even under Section 2. But even more clearly Section 1 is confessedly "general" in every aspect and applies to "every common carrier by railroad while engaged in commerce between any of the several states or territories or between any of the states or territories, or *between the District of Columbia and any of the states or territories*," thereby excluding it from the reasoning of Chief Justice White which made the local statute only applicable in such transit "*in the absence of legislation by Congress of a general character governing the subject.*"

The case of *McGowan vs. Parrish*, 228 U. S., 312, very clearly lays down the rule that when the construction of a law of the United States which is applicable to the United States generally is drawn in question by the defendant, a right of appeal exists and a writ of error should be granted.

For the reason that the only way that uniformity of construction so essential to the proper administration of these statutes can be enforced in the District of Columbia in event it should be held that Section 2 and not Section

1 is the only section under which the right of action accrues when injuries occur within the District of Columbia, even though both employer and employee are then engaged in interstate commerce, and that the section is purely local in its application, and affects all the other sections of the Act with its local character, is by reviewing such erroneous decisions, it is respectfully prayed that a writ of certiorari be awarded.

All of which is respectfully submitted.

WASHINGTON RAILWAY AND
ELECTRIC COMPANY,

By Counsel.

John S. Barbour.
Attorney for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

No. 826.

File No. 25,565.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, *Petitioner*,

vs.

ANN CATHERINE SCALA, ADMINISTRATRIX OF THE ESTATE OF ALVIN JOSEPH SCALA, DECEASED, *Respondent*.

BRIEF

ON BEHALF OF RESPONDENT
IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI

The respondent, Ann Catherine Scala, administratrix of the estate of Alvin Joseph Scala, deceased, respectfully objects to the petition for, and the issuance by this Honorable Court of, a writ of certiorari, for the following reasons:

FIRST The case is already pending in this Court on writ of error.

The action was originally brought on January 27, 1914, by respondent as plaintiff in the Supreme Court of the District of Columbia, and on December 11, 1915, judgment on verdict in favor of plaintiff was entered for \$7,500. This judgment, on December 4, 1916, was affirmed on appeal by the Court of Appeals of the District of Columbia, which court on December 8, 1916, granted a writ of error to remove said cause for review by this Honorable Court. The petitioner, as plaintiff in error in this Court, has filed its supersedeas bond, and has had the Transcript of Record on said writ of error printed, and the same is now on file in the clerk's office of this Honorable Court.

It is respectfully submitted that, where the entire record of proceedings in the lower courts is embodied in the printed Transcript of Record in this Court on a pending writ of error, a petition for writ of certiorari in the same cause should be denied by this Honorable Court.

SECOND: The time for presenting a petition for writ of certiorari will have expired on the date when said petition is submitted.

On the 16th day of February, 1917, Daniel W. O'Donoghue and Arthur A. Alexander, attorneys for Respondent, were served with a printed (unsigned in print or ink) copy of the petition herein, together with typewritten notice that said petition "will be submitted to the court on Monday, March 5, 1917, at 12:00 noon, or as soon thereafter as counsel can be heard;" and on said

February 16, 1917, said petition and notice were "filed" in the office of the clerk of this Honorable Court.

It appears from said petition that it is sought to have this Honorable Court review by writ of certiorari a certain final judgment of the Court of Appeals of the District of Columbia rendered on the *4th day of December, 1916*.

Section 6 of the Act of Congress approved September 6, 1916, entitled "An Act to Amend the Judicial Code," etc., 39 Stats. L., 726, provides:

"That no * * * writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of; * * *"

It appears from the "minutes" of February 5, 1917, of this Honorable Court that on that day the Court "adjourned until Monday, March 5, next, at *11 o'clock*." Counsel for respondent understand that, while this Honorable Court will convene on said March 5, 1917, at said *11 o'clock*, the Court will not then be in session for the presentation or submission in open court of any petitions or motions of any description whatsoever, and that *the Court will not continue in session on said day to as late as 12:00 noon*, the time designated in said notice for the submission of the petition herein, because said "12:00 noon" of said March 5, 1917, is the appointed hour for the reinaugural ceremonies of the President, and because members of the bar cannot enter the Capitol building to appear before this Honorable Court on said day. Counsel for petitioner in designating said "12:00 noon" in said notice knew, or should have known, the

above-mentioned facts, and was bound to take notice of the fact that this Honorable Court will convene on said day, pursuant to the said entry on its minutes at 11 o'clock, and not at 12 o'clock, on said March 5, 1917.

It is respectfully submitted that to allow the petition herein to be presented in open court in advance of the hour designated in said notice, that is, at 11 instead of at 12 o'clock on said March 5, 1917, would be contrary to the notice prescribed by Section 3 of Rule 37 of this Honorable Court (even if counsel could gain admission to the Capitol building and court room on said day).

It is apparent, therefore, that the petition herein will not, and cannot, be "*submitted*" or "*presented*" in open court at said 11 o'clock, or at said 12 o'clock of said March 5, 1917, or at any time *until after said March 5, 1917*, which will be when more than "*three months*" have elapsed from the date of the judgment complained of; and that, therefore, this Honorable Court has no power or jurisdiction, under said Act of Congress, to issue a writ of certiorari to review said judgment of December 4, 1916.

It is respectfully submitted that the petitioner in this case cannot bring itself within said statutory period of "*three months*," by simply having "*filed*" its said petition in said clerk's office on said February 16, 1917, for the reason that the provisions of Section 4, Rule 37, of this Honorable Court do not apply to the present situation. Said rule reads as follows:

"4. In any case where the time for presenting a petition for certiorari is expressly limited by statute and where the court has adjourned for the term, the petition may be presented during such adjournment and within the period pre-

scribed, by filing it, together with the printed record and briefs, in the office of the clerk, and such filing shall have the same effect as a presentation in open court."

The "printed record" was filed herein as part of the proceedings on the pending writ of error herein.

It is evident that said rule applies only to the summer recess or vacation of the Court, "where the court has adjourned *for the term*." The period of time from said February 5 to March 5, 1917, is but part of the "October Term, 1916," and is not an adjournment of said term, and said March 5, 1917, is not the commencement of an "adjourned or special term," because Sec. 230 of "The Judicial Code" (as amended by the Act of September 6, 1916, 39 Stat. at L. 726), provides that:

"Sec. 230. The Supreme Court shall hold at the seat of government one term annually, commencing on the first Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business."

and because Rule 27 of this Honorable Court provides that:

"The Court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the Court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment."

As stated, the minutes of the Court for said February

5, 1917, show: "Adjourned until Monday, March 5 next, at 11 o'clock," and there has been no announcement of adjournment "*for the term*" during this present October Term, 1916, in accordance with said Rule 27, which would make said March 5, 1917, the commencement of an "adjourned or special term," or any action by the Court which could change the status of the period of said February 5 to March 5, 1917, from a suspension of sessions *in and as part of* said "October Term, 1916," to an adjournment "*for the term.*"

Therefore, it is respectfully submitted that, under the rules of this Honorable Court and under said Act of Congress, the mere "*filing*" of said petition in said clerk's office on February 16, 1917, and its subsequent actual presentation in open court on any date *after* said March 5, 1917, do not constitute a writ of certiorari "duly applied for within three months after entry of the judgment or decree complained of;" and hence that said petition for said writ should be denied by this Honorable Court.

THIRD: The petition is not sworn to.

The petition for writ of certiorari in this case is not supported by the affidavit of the attorney for petitioner, or of any officer of the petitioning corporation, or by any affidavit whatsoever, which omission is contrary to the uniform practice; and, therefore, it is respectfully submitted that said petition should be denied by this Honorable Court.

FOURTH: The petition does not correctly or completely state the proceedings below, and is misleading.

The petition for writ of certiorari in this case does not

correctly or completely state the proceedings below in the Supreme Court, and in the Court of Appeals, of the District of Columbia, and is misleading in that:

(a) The petition alleges erroneously (at the bottom of page 1),

"that the action arose under the Federal Employers' Liability Act of April 22, 1908 (35 Stats. L., 65),"

and (on page 2) that:

"The declaration as originally filed made no claim for conscious pain and suffering on the part of decedent, and only claimed pecuniary damages resulting to the next of kin for whose benefit it was instituted,"

whereas the action was brought not only under said Act, *but also under the Amendatory Act thereto of April 4, 1910* (36 Stats. L., 291), and whereas the declaration claimed originally not only pecuniary damages resulting to the next kin but also damages for the conscious pain and suffering of decedent, as will appear by an inspection of the 3d and 4th counts of the declaration (Rec. 6-8).

(b) The petition alleges erroneously (on page 2) that "The decedent survived the injury but thirty minutes, and died without having regained consciousness;" whereas the evidence in the case, as shown by the transcript of record herein, establishes that decedent survived at least *forty-one minutes or longer*, and that he was conscious during that period because he was constantly groaning and moaning, and opened his eyes and spoke,

saying some time after the injury: "Oh, my God." See the testimony of the witnesses: Tarbell (Rec. 20), Hardy (Rec. 22-23), Burroughs (Rec. 23-24), Knowles (Rec. 24), Martz (Rec. 25), Perry (Rec. 27), Whalen (Rec. 31), Holmes (Rec. 46), Wiser (Rec. 50-51).

(c) The petition alleges erroneously and misleadingly (on page 2) that:

"In October, 1915, more than two years after the accident, and during the progress of the trial, the declaration was amended so as to allege and seek a recovery for conscious pain and suffering,"

whereas the bill of exceptions in this case certifies that the declaration was amended not only during the progress of the trial, but was also amended *seven days before trial*, namely, on *October 20, 1915*, as follows:

"And on that date and at that time the attorneys for the plaintiff and the attorney for the defendant being present in Court, and thereupon counsel for plaintiff asked leave of the Court to amend the fourth count of the declaration, by inserting in the fifteenth line of the last page thereof, after the word 'hemorrhages,' the words 'and causing him to suffer intense pain and injuries,' and thereupon counsel for defendant stated to the Court THAT HE DID NOT OBJECT TO THE ALLOWANCE OF THE AMENDMENT; and thereupon the Court allowed said amendment, and the case was continued and set for trial the following week" (Rec. 17);

and the trial commenced

"on the 27th day of October, 1915;" (Rec. 17):

and whereas the original declaration pointed to the claim for conscious pain and suffering, and the amendment of said October 20 and also of October 29, 1915, were merely in amplification of the allegations in that respect in the original declaration, and therefore related back to the beginning of the suit.

As was said in *Ill. Surety Co. v. Peeler*, 240 U. S., 214:

"In respect to the amendment of the complaint, it is apparent that * * * there was an existing right of action under the statute at the time the suit was brought. * * * The Court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations, and in this there was no error."

And in the case of *Mo., K. & T. R. Co. v. Wulf*, 226 U. S., 570:

"Nor do we think it (the amendment) was equivalent to the commencement of a new action so as to render it subject to the two years' limitation. * * * It introduced no new or different state of facts as to the ground of action, and therefore it related back to the beginning of the suit."

And in *Seaboard Air Line v. Renn*, 241 U. S., 290:

"If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time."

(d) The petition alleges erroneously and misleadingly (on page 2) that:

"The defenses were: (1) That the defendant, a street car company purely, not engaged in the transportation of freight of any kind, was not a 'common carrier by railroad,' within the meaning of the Federal Employers' Liability Law of 1908,"

whereas the entire bill of exceptions in this case may be searched in vain for any words, statement, objection, or exception therein, supporting the allegation that any such defense was ever made in the *trial* court, or passed upon by the trial court. It is true that such a defense was made *for the first time* in the Court of Appeals of the District of Columbia and passed upon by that Court, but, as a matter of record, and as a matter of fact, that defense, predicated on the term "*railroad*" was never made in the *trial* court. Its first appearance in the case was in the printed Brief of petitioner as appellant in the Court of Appeals of the District of Columbia, and in that Court, respondent urged, *as it now urges before this Honorable Court*, that a defendant cannot raise a defense for the first time on appeal when it never raised that defense on trial, or made the slightest objection based thereon all during the progress of the trial.

Moreover, the above-quoted allegation of the petition

is erroneous in stating that petitioner is a "street car company purely," because the bill of exceptions herein certifies that respondent introduced in evidence a certificate and the following U. S. Statutes-at-large (Rec. 33) :

"27 Stats. at L., 326,

28 Stats. at L., 492,

29 Stats. at L., 246,

31 Stats. at L., 270."

An examination of these statutes and certificate shows that petitioner, under its old corporate name, the "Wash. & Great Falls Electric Railway Company," was chartered not as a "street car company purely," but as an electric trolley railway line running *entirely westwardly* from 36th and Prospect Streets, northwest, in the city of Washington, D. C., out to Cabin John, in the State of Maryland; that is, as an interurban or suburban electric trolley line, doing an interstate business, running from the western edge of the city westwardly through sparsely-settled suburbs and the open country, with the right to institute condemnation proceedings to acquire its right of way, etc., and that afterwards, simultaneously with the change to its present corporate name of "The Washington Railway and Electric Company," it entered into a contract whereby it obtained the use of the tracks of a city street railroad running eastwardly from its said beginning. As was said by the Court of Appeals (Rec. 75) : The petitioner "was incorporated under the Act of Congress * * *. An examination of this act and of the acts amendatory thereof * * * discloses that the company was chartered, not as a street railway company, but as an electric trolley suburban and interurban railway com-

pany," etc. In addition to the evidence of said statutes and certificate, the bill of exception discloses (Rec. 33) an admission by petitioner's present counsel, who also represented it in both courts below, that petitioner's railroad is constructed on its own property:

"Mr. O'Donoghue: * * * You admit that you own the station. You will admit that instead of my having to bring the Recorder of Deeds up here?"

Mr. Barbour: I presume it is. It is on our right of way. * * *.

Mr. O'Donoghue: It is of record that they own the right of way and the land running from Prospect Avenue up to Glen Echo, and also the railroad station on 36th Street on the east side of 36th Street, between Prospect Avenue and N Street.

Mr. Barbour: Yes."

The injury occurred not within the city limits of Washington or Georgetown, but out in country on the petitioner's right of way at McCoy's station, about a mile west of the western edge of Georgetown, as shown by the evidence (Rec. 8, 51).

It is respectfully submitted that under the above-mentioned evidence, and from other evidence to be found in the Transcript of Record, and under the decisions of this Honorable Court, respondent is a "common carrier by railroad" within the meaning of the statute.

See *Kansas City W. Ry. Co. v. McAdow*, 240 U. S., 51;

Spokane & I. E. R. Co. v. U. S., 241 U. S., 344;

Spokane & I. E. R. Co. v. Campbell, 241 U. S., 497;

Omaha & C. B. Ry. v. I. C. C., 230 U. S., 324.

The petition herein on pages 4 and 5 attempts to argue that the Omaha & Council Bluffs Ry. case, *supra*, is authority for its contention that it is not a "railroad" within the meaning of the Employers' Liability Act, but that case construed the Interstate Commerce Act of 1887, and not the Employers' Liability Act of 1908. Mr. Justice Lamar, in delivering the opinion of the Court, pointed out that "in 1887 that word (railroad) had no fixed and accurate meaning" and that "the meaning of the word is to be determined by construing the statute as a whole," and reasoned that the Act of 1887 only "referred to railroads which were required to post their schedules, not at street corners where passengers board cars, but in 'every depot, station or office where passengers or freight are received for transportation'," and that "only a few of its requirements are applicable to street railways, which did not do the business Congress had in contemplation, and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit," and, therefore, held that the street railway in question was not a "railroad" within the meaning of the Act of 1887. In the course of the opinion, however, Mr. Justice Lamar took occasion to say:

"But it is said that since 1887, when the Act was passed, *a new type of interurban railroad has been developed*, which with electricity as a motive power, uses larger cars, and runs through the country from town to town. * * * We are not dealing with such a case, but with a com-

pany chartered as a street railroad. * * *
 The case was heard on demurrer, with the opinion of the Commission treated as part of the record. *It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear;*"

having previously observed that:

"Applying this universally accepted rule of construing this word, it is to be noted that *ordinary railroads* are constructed on the companies' own property,"

and:

"Street railroads, on the other hand, are local, are laid in streets."

Moreover, petitioner's contention is no longer an open question in this Court, but was disposed of in the case of *Kansas City W. Ry. Co. v. McAdow*, 240 U. S., 51, wherein it was said:

"The errors assigned are, in substance * * * that the Act (Employers' Liability Act) does not apply to electric roads. * * * The defendant road appears to be of the class of the Traction Company that was before the Court in *United States v. Baltimore & Ohio Southwestern R. R.*, 226 U. S., 14, and that was excluded from the decision in *Omaha & Council Bluffs Ry. v. Interstate Commerce Commission*, 230 U. S., 324, 337. Such roads have been held to be within the acts of Congress."

(e) From the allegation (on page 2) that:

"The defenses were: * * *

(6) That as to the conscious pain and suffering, (a) That the evidence did not show that he had undergone conscious pain and suffering; (b) That the statute of limitations barred such a claim before the declaration asserting it was amended."

it might be inferred that said defenses were made in the first instance by defendant at the trial; whereas the bill of exceptions certifies that (Rec. 41-2):

"at the close of the plaintiff's case, the defendant, by its counsel, moved the Court * * * to instruct the jury to return a verdict for the defendant upon the ground that the evidence is not sufficient to maintain the case stated by the plaintiff in her declaration, stating 'as matter of law, that a pole 30 inches away from the stanchion under the circumstances shown in this case is far enough away to relieve the company from any negligence if a man is injured walking along the running-board with reasonable care;' and stating the evidence showed that decedent was injured as the result of 'assumption of risk;' and in addition to that, stated there is no evidence here to sustain any other assumption but that this man was injured as the result of losing his foothold on the running-board. THESE WERE THE ONLY SPECIFICATIONS MADE BY COUNSEL FOR DEFENDANT IN SUPPORT OF HIS MOTION;"

and that defendant's motion for a directed verdict at the close of all the evidence in the case (Rec. 60), was but a renewal of its former motion; and that it was not until after the trial court had passed upon plaintiff's first five prayers (Rec. 66), and was considering plaintiff's Prayer No. 6 that defendant raised the question of the bar of Statute of Limitations, and made any objection as to the claim for conscious pain and suffering. And at no time in the trial Court, not even on its motion for a new trial, did defendant make the objection that it was not a "railroad" within the meaning of the statute.

(f) The petition erroneously and misleadingly alleges (at top of page 3) that:

"The evidence showed *without contradiction* that the condition complained of was a permanent and *obvious* one; that * * * the decedent * * * had been over this route repeatedly and in excess of 150 times within a month or two of his death; that the proximity of the pole did not cause him to fall, but that he lost his footing on the running-board," etc.

because the bill of exceptions shows that it was the proximity of the pole that caused decedent to be struck thereby, and that it was contact with the pole which caused decedent to fall, and that decedent did not lose his footing until after he was struck by the pole; and because said allegation is misleading in that it fails to state, as shown by the bill of exceptions, that half of the trips made by decedent were on the return track away from the pole in question, and that decedent prior to the time of the injury had never passed that pole *while on the running-board* of the car.

And because the petition, in stating: "*Without contradiction* that the condition complained of was * * * *obvious*," disregards entirely the evidence to the contrary found in the bill of exceptions; for instance, the testimony of the witness Wiser, who was the motorman of the car at the time plaintiff's intestate, the conductor on the same car, was injured. Wiser testified as a witness on behalf of defendant, and his cross-examination was in part as follows:

"Q. You never noticed that pole, did you?

A. No, sir; I never did.

Q. You never knew anything of it before this time?

A. I have saw it many a time.

* * * * *

Q. Was there anything to attract your attention to that pole more than any other pole?

A. No, sir.

* * * * *

On redirect examination witness stated he had made that run out there "right often." (Rec. 51.)

And the testimony of the witness Whalen, who was called by both sides, and who testified that the next morning after the injury he went to the scene thereof with certain officials of the defendant company, when measurements were taken (Rec. 31, 49), and that "under the circumstances" of discussing while there "the distance of this particular pole as compared with the other poles," he was unable to notice that it was closer to the track than the average, or normal, distances of the other poles, and said on the witness stand:

"I guess it was the average distance of the poles away from the tracks."

The evidence in the case shows that the pole in question was closer to the track than any other pole along the track. (Rec. 40-1.)

(g) The petition alleges erroneously (on page 3) that:

"The Court refused to direct the jury * * * that defendant was not a common carrier by *railroad*."

because, as hereinbefore mentioned, the trial court was never called upon to pass upon said question; it was never raised in the trial court by defendant.

(h) The petition alleges erroneously and misleadingly (on page 3) that:

"The Court * * * refused prayers submitting those questions (assumption of risk) to the jury."

because the bill of exceptions certifies that the Court granted the following prayers on the question of assumption of risk:

Plaintiff's Prayer No. 3 (Rec. 61),

Plaintiff's Prayer No. 5 (Rec. 61),

and also fully and fairly charged the jury in that respect (Rec. 70-1); and because there was only a general objection taken to the Court's charge (Rec. 73).

(i) The petition alleges erroneously (page 5) that:

"The trial Court and the Court of Appeals of the District of Columbia both held that the insti-

tution of the original suit, *though no claim was there made for conscious pain and suffering*, stopped the running of the statute of limitations," etc.,

whereas such was not in fact the ruling of either the trial Court or of the Appellate Court, because, as hereinbefore pointed out, together with citations of authorities hereinbefore, the trial Court held that the original declaration did "point" to the claim for conscious pain and suffering so that the amendment in respect thereto was merely in amplification of the allegations contained in the original declaration, and was not barred by the Statute of Limitation as it related back to the original declaration, and the Court of Appeals affirmed this ruling of the trial Court.

CONCLUSION.

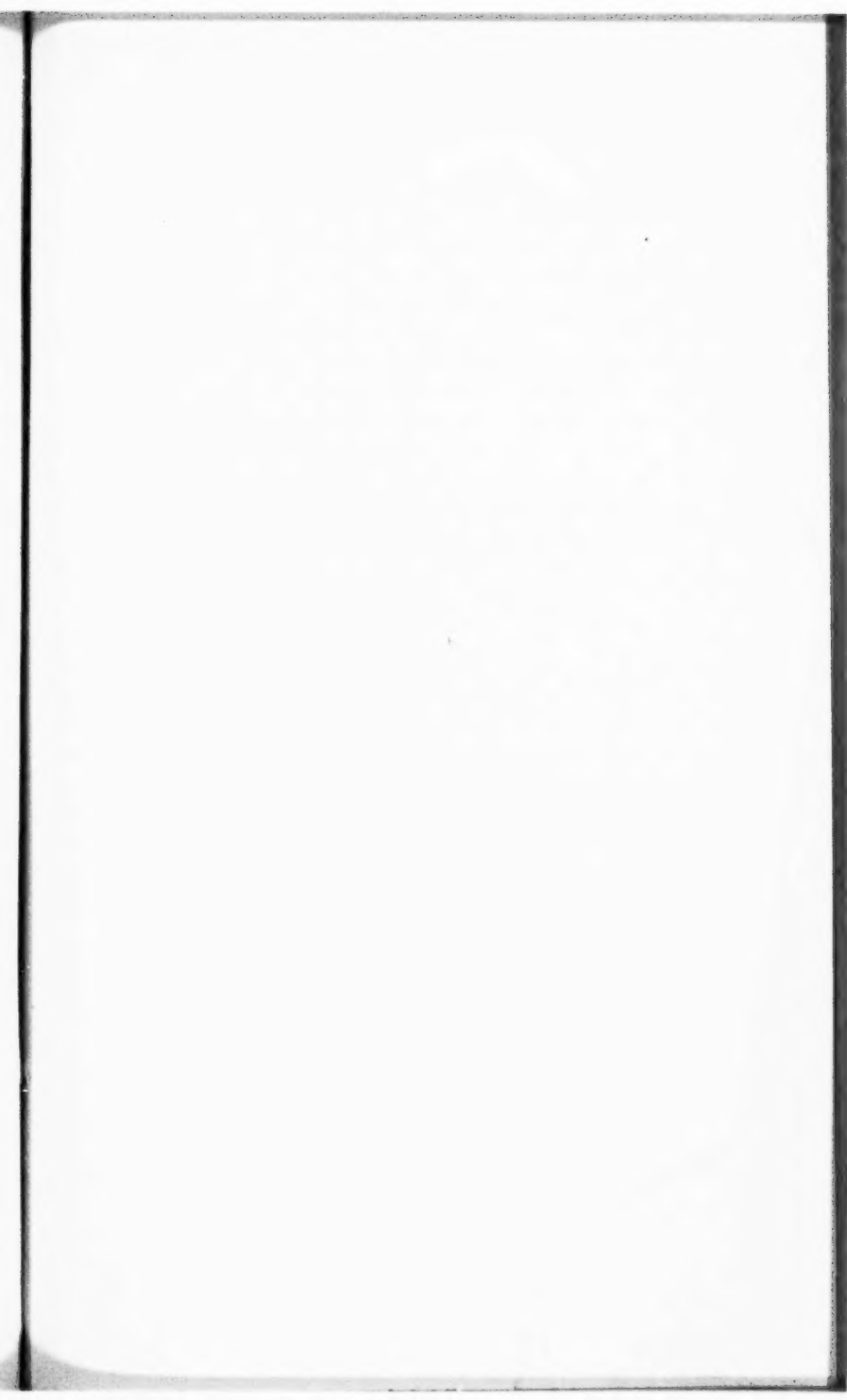
On the questions of whether the allegations of the original declaration "pointed" to a claim for conscious pain and suffering of decedent, and the amendment in that respect, and whether petitioner is a "railroad" within the meaning of the statute (Employers' Liability Act of 1908 and Amendment of 1910), it should be borne in mind that this Court, in the case of *St. L. I. M. & S. Co. v. Craft*, 237 U. S., 648, which involved a claim for conscious pain and suffering of a decedent, announced that the Act

"should not be narrowly or restrictively interpreted."

For the reasons hereinbefore set forth, and for the

further reasons that it is apparent from a reading of the petition herein and from an inspection of the Transcript of Record herein, that a review is sought in this Court mainly of the weight of the evidence in the trial Court and that no questions of law were presented to said Court of Appeals, or will be, or can be, presented to this Court which have not already been decided by this Court in other cases adversely to the contentions of petition herein by this Court, and that the rulings of both lower courts were in accordance with the decisions of this Court, it is respectfully submitted that the petition for writ of certiorari in this case should be denied by this Honorable Court.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
*Attorneys for Respondent, Ann
Catherine Scala, Administratrix
of the Estate of Alvin Joseph
Scala, Deceased.*



UNITED STATES SUPREME COURT, U. S.

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

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No. 826.
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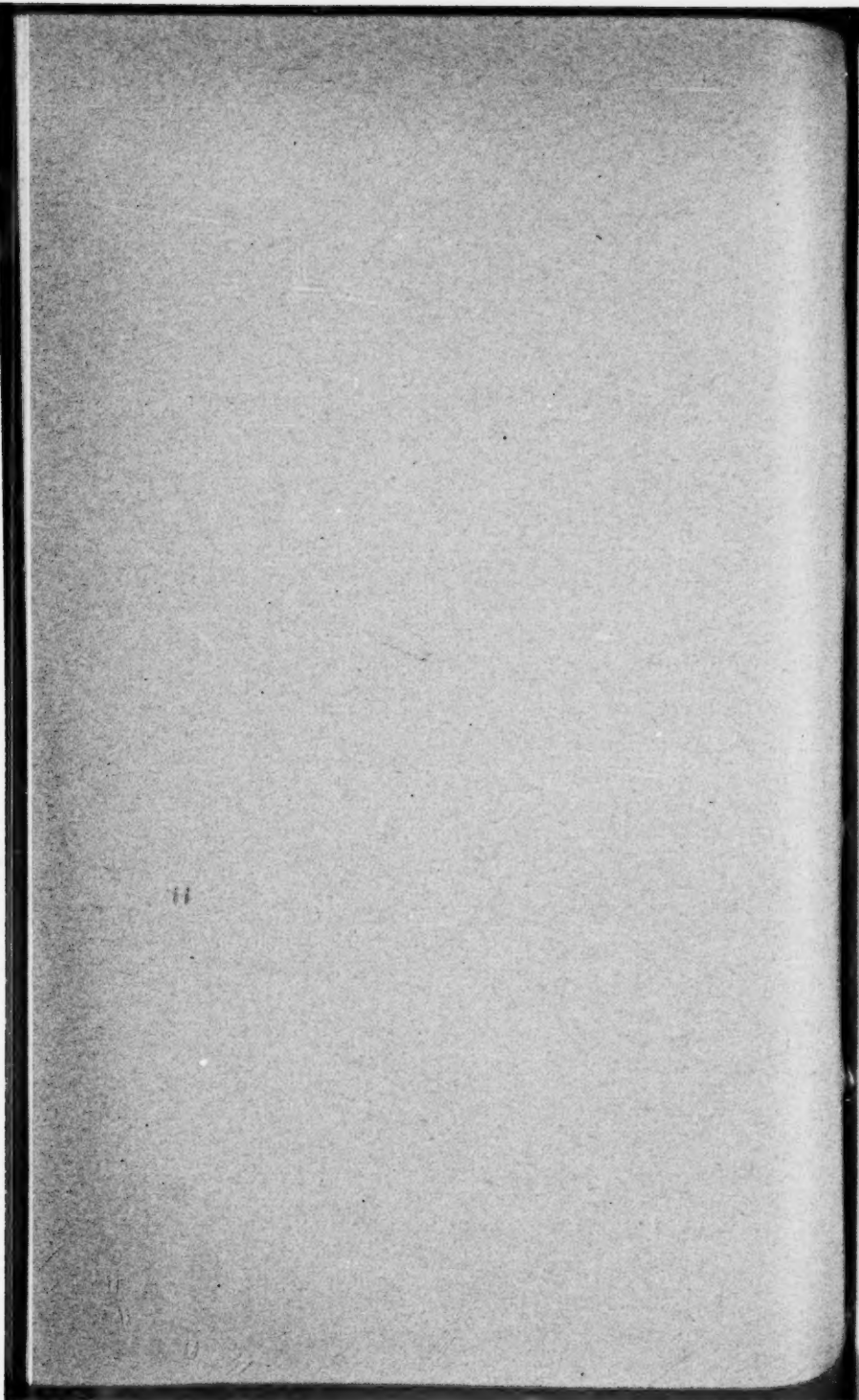
WASHINGTON RAILWAY AND ELECTRIC COM-
PANY, PLAINTIFF IN ERROR AND
PETITIONER,

vs.

ANN CATHERINE SCALA, ADMINISTRATRIX OF
THE ESTATE OF ALVIN JOSEPH SCALA, DE-
CEASED, DEFENDANT IN ERROR AND RE-
SPONDENT.

—
**In Error and on Petition for Certiorari to
the Court of Appeals of the District
of Columbia.**
—

JOHN S. BARBOUR,
Attorney for Appellant and Petitioner.



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IN THE
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WASHINGTON RAILWAY AND ELECTRIC COM-
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vs.

ANN CATHERINE SCALA, ADMINISTRATRIX OF
THE ESTATE OF ALVIN JOSEPH SCALA, DE-
CEASED, DEFENDANT IN ERROR AND RE-
SPONDENT.

**In Error and on Petition for Certiorari to
the Court of Appeals of the District
of Columbia.**

STATEMENT.

The Plaintiff in Error and Petitioner, who was the de-
fendant below, hereinafter referred to as the Appellant, is
a street railway corporation originally incorporated under
an Act of Congress approved July 29, 1892 (27 Stats.,
326), as amended by Act of Congress of August 23, 1894
(28 Stats., 492), further amended by Act of Congress of
June 3, 1896 (29 Stats., 246), and Act of Congress of June
5, 1900 (31 Stats., 270).

Sections 1, 2 and 3 of the Acts of July 29, 1892, and August 23, 1894, were entirely superseded by like sections of the Act of June 3, 1896, which incorporated the appellant under the name of the Washington and Great Falls Electric Railway Company, and authorized it to construct and operate a continuous line of single or double track railway and to operate the same by electricity through and along the several named streets, avenues and roads (Act of July 29, 1892, 27 Stats., 326), "beginning at a *passenger station to be erected and maintained* on the square bounded by Prospect, 35th, M and 36 streets, northwest * * * thence westerly along Prospect street" and along and over certain other streets and roads named "to Cabin John Creek," returning thence along the same line by return tracks to the place of beginning (Act of June 3, 1896, 29 Stats., 246), with the privilege of constructing and operating certain specifically named branch lines; provided, however, that said railway company "may contract with any *street railway company* in the State of Maryland or the District of Columbia owning or operating connecting or intersecting lines for the *joint management, lease or purchase* of said line or lines and operate the same in connection and as an extension with its present line."

Section 1 of the same act as finally amended by Act of June 3, 1896, further provided that

*"No steam cars, locomotives or passenger or other cars for steam railways shall ever be run over the tracks of said railway within the said District of Columbia or on said lands. * * * The provisions of this act as far as applicable shall apply to any extension of this railway in the State of Maryland that may be granted by said State."*

Said section further required

"The gauge of the track to be the same as that of the Washington & Georgetown Railway; and the

said Washington and Great Falls Electric Railway Company shall, where its tracks run on or across any street or road which is under the jurisdiction of the Commissioners of the District of Columbia, pave the same between the rails and sets of rails, and two feet outside thereof, with such material and in such manner as shall be approved by the proper authorities. * * * The said corporation shall operate its said road by electric power, and for this purpose it is hereby authorized to erect such poles and aerial lines as may be necessary for the proper conduct of said power. * * * Said corporation shall at its own expense maintain electric lights during the hours after nightfall that its cars shall run, and at least until twelve o'clock ante-meridian, which lights shall be located so as to light all roads on and across which the railway shall pass and such other points along the proposed route as the Secretary of War shall direct. * * * Efficient signals, by gong or bell, shall be made by every car before and during the crossing of the Conduit road." * * * and "the fare for riding over the said road shall not exceed *ten cents each way per passenger*," and this amount may be divided into divisions of five cents each.

Section 4 of the Act of July 28, 1892, provides :

"Nor shall it cross any *steam railroad* at grade."

Section 4 of the Amendatory Act of August 23, 1894 (28 Stats. 492), provided that "*the street railway companies mentioned in this act, and hereafter all street railway companies in the District of Columbia, respectively, shall bear all the expense* that may be incurred by the United States in making and inspecting such changes to the water mains, fixtures, or apparatus of the Washington Aqueduct as may be rendered necessary by the construction or extension of *such several roads*."

By Act of June 5, 1900 (31 Stats. 270), this same company, then known as the Washington and Great Falls Electric Railway, together with the Anacostia & Potomac River Railroad Company, the Brightwood Railway Company of the District of Columbia, the Capital Railway Company, the City and Suburban Railway Company, the Columbia Railway Company, the Georgetown & Tennallytown Railway Company, and the Metropolitan Railway Company, all of which were *street railway companies pure and simple*, previously incorporated under acts of Congress, were authorized

"Under the authority of this act * * * to enter into contracts with each other or with any of the others for the use of their respective roads or routes or any part thereof; * * * *Provided*, that in case any corporation enters into any such contract it is hereby authorized to change its corporate name to any other corporate name not then lawfully used by any existing corporation incorporated or organized in the said District."

Section 2 of the same act provides that the appellant might

"acquire and hold stock in any *street railway corporation* specifically named above, with which it is authorized by the terms of this act to enter into a contract for the use of its road or route,"

and might also agree with any such corporation

"for the purchase of the estate, property, rights and franchises of such other corporation * * * Upon the execution of such contract of purchase * * * the estate, property, rights and franchises of the corporation selling the same shall vest in and be held and enjoyed by the Washington and Great Falls

Electric Railway Company as fully and entirely, without change or diminution, as the same were before held and enjoyed by the company selling the same * * * in its corporate name or in such other name as it shall adopt by the filing of a certificate as hereinbefore authorized * * * *And provided further*, That the right or privilege granted by section one of the act approved July 29, 1892 * * * by which said company is authorized to charge a fare of ten cents per passenger * * * be and the same is hereby amended so as to limit the rate of fare on said line of railway to five cents per passenger; and * * * is hereby required to sell tickets at the rate of six for twenty-five cents, each good for the transportation of one passenger over the whole or any part of its said line of railway authorized and described by said act within the District of Columbia."

Pursuant to this act, the Washington and Great Falls Electric Railway Company, having acquired several of the street railways above mentioned, changed its name to the Washington Railway and Electric Company, which is this appellant.

The appellant contends, first, that it was thus incorporated as a street and suburban carrier of *passengers only* and not as a common carrier by railroad within the meaning of the Employers Liability Act; and, second, that it engages in no business other than that of a strictly street and suburban carrier of passengers.

Alvin Joseph Scala, the appellee's decedent, entered the employ of the appellant as a trolley car conductor in June, 1912, upon his written representation that he was then over twenty-one years of age. This representation was endorsed in writing by his father, Francis Wm. Scala, one of the beneficiaries in this suit (R., p. 13). This representation was at the trial sworn to be false by both beneficiaries in this suit, his mother, Ann Catherine Scala (R., p. 18), and his said father, Francis Wm. Scala (R., p. 34), who both

stated that he was but eighteen years of age at the time of his death.

Following his employment he was first assigned as an extra conductor on the Cabin John division of the appellant's lines, operating during the summer months from 14th and East Capitol streets, in the City of Washington, to Cabin John Bridge, in the State of Maryland, past the scene of the accident, and Glen Echo Park, and made 22 runs as such extra conductor between the time of his employment in June, 1912, and September, 1912, at which time, owing to the fact that Glen Echo Park was closed, he made no further runs on that part of the line that year. The amusement park was opened again in May, 1913, and young Scala was again assigned to this line and served as a regular conductor thereon from the opening of the season until July 8, 1913, the day of his death. The record shows that during the summer of 1912 he made 22 round-trips over this line and past the scene of the accident, and during the summer of 1913, up to and including July 8, 1913, the day of his death, he made 72 round-trips additional, making a total of 94 round-trips, or 188 single trips, past the point at which he was killed, thus showing ample opportunity to learn by observation the conditions existing on the entire line.

On the evening of July 8, 1913, while passing McCoy's Station, which is between 36th street and Glen Echo Park, young Scala, according to the uncontradicted testimony of the only actual eye-witness to the occurrence, who was introduced by, and testified on behalf of, the Appellee, while passing along the running-board of an open summer car, from some unknown mishap lost his footing on the running-board while his car was in motion, which caused him to slip and his body to swing far beyond the usual extent of the sides of the car, and while in this position, and struggling to regain his foothold, he was struck; not on the head, but about the "rump," by one of the trolley poles located four feet four inches from the nearest rail, and three feet

eleven inches from the side of his car, with such violence that his hold on the car was broken and he fell to the ground; his hip was crushed, and he died—without recovering consciousness—within thirty minutes after the accident.

His mother, Ann Catherine Scala, qualified as his Administratrix, and in February, 1914, instituted her action at law against this appellant for \$20,000.00 damages.

The original declaration contained four counts. The first two were each for \$10,000 only and were evidently asserted under the provisions of the District statute giving a right of action to the personal representative of a decedent whose death was the result of negligence (District of Columbia Code, Sec. 1301). The third and fourth were each for \$20,000 and were as plainly brought under the provisions of the Federal Employers Liability Law of 1908 as amended, but with no allegations or demands justifying a recovery for conscious pain and suffering. All four counts relied on pecuniary damage to the statutory beneficiaries, the first two for the benefit of the father alone, the last two for both parents.

Each of the first two counts alleged the appellant to be

*"a common carrier of passengers for hire operating certain lines of railways in the said District and State propelled by electricity, running and conducted on overhead wires above the cars * * * supported by cross wires attached to upright posts or poles planted or placed in the ground on the outside of each track;"*

being run and operated among other streets, lines and places on and over certain named streets in the City of Washington,

*"thence westwardly over a right of way or suburban line or territory and country to Glen Echo and Cabin John Bridge in the County of Montgomery in the State of Maryland; * * * that said deceased*

had been and was employed by the defendant as a conductor on *one of the summer cars* of the defendant operated over the line aforesaid, and in the performance of his duties as such conductor was required to step, walk and move along the running-board or step and board along the outer side of the summer cars and to catch hold on to the stanchions or holders affixed to the uprights at the end of each seat; * * * that the defendant did negligently, carelessly and in a dangerous manner plant or place said upright posts or poles along the outer tracks of said line *too near* to the cars and to the running board * * * leaving only a distance of to-wit seventeen inches between said posts or poles and the stanchions or holders; * * * and * * * while employed as aforesaid and operating a summer car of the defendant * * * running westwardly over said track * * * at what is known as McCoy's Station * * * and while lawfully in and upon the stepping-board of said car, and while in the performance of his duties as aforesaid, and while in the exercise of due care, was hit or struck by one of the said posts or poles planted by the defendant too near to the running-board * * * as aforesaid * * * and was thereby knocked from said car * * * and his backbone or spine * * * crushed and broken and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages in direct consequence whereof the deceased died * * * within one hour after being hit and struck; * * * that the deceased was unmarried and * * * eighteen years of age, and left surviving him this Plaintiff, his mother, and Francis Wm. Scala, his father, as his only next of kin, with whom he resided and to whose support he contributed, and who by reason of the wrongful act, negligence and carelessness of the Defendant as aforesaid, resulting in the death of the said deceased, *has suffered and will in the future suffer great loss and damage.*"

It will be observed that these two counts, drawn confessedly under the District statute which permits recovery for pecuniary loss alone, alleged this pecuniary loss as accruing solely to the father.

The third and fourth counts are substantially similar to the first and second except that the appellant company is alleged to be

"a common carrier engaged in trade and commerce in said District and State, owning and operating certain lines of railways in said District and State propelled by electricity conducted on overhead wires above the cars which overhead wires are supported by cross wires attached to upright posts or poles planted or placed in the ground on the outside of each track."

instead of "a common carrier of passengers" likewise engaged. The duty of the appellant is alleged in substantially the same terms, and likewise its breach, to-wit, that

"wholly unmindful of its duty in the premises, did negligently, carelessly and in a dangerous manner plant or place said upright posts or poles along the outer track of said line too near to the cars and to the running-board" (R., p. 6).

The third count alleges that the decedent,

"while in the performance of his duties as aforesaid, was hit or struck suddenly with force and violence *on the right side of his head* by one of said posts or poles planted * * * too near to the running-board * * * as aforesaid, to-wit, the distance of only seventeen inches."

The fourth count differs from the third only in that it omits the allegation specifying that the blow was received on the side of the head, and merely alleges generally that he was struck and thrown from the car.

Both the third and fourth counts as originally filed alleged that the decedent

"was unmarried, was eighteen years of age, left surviving him the plaintiff, who is his mother, and Francis Wm. Scala, who is his father, with whom he resided, and to whose support he contributed, and who by reason of the wrongful act, negligence and carelessness of the defendant * * * *have* suffered and in the future will suffer *great loss and damage*,"

and concludes :

"Wherefore the plaintiff says that by reason of the premises and in accordance with the statutes in such case made and provided, the Defendant is liable for an action of damages and a right of action *has accrued to the plaintiff* as personal representative of said deceased on behalf of and for the benefit of the said parents of the deceased," and lays the damages at \$20,000.00.

When these four counts are contrasted it is clear that the first two are brought under the District statute and are for the benefit of the father alone. The clauses alleging the accrual of the action and resulting damage to the beneficiary are in the singular number and allege that Francis Wm. Scala, "as his only next of kin, * * * *has* suffered and will in the future suffer great loss and damage," whereas the third and fourth counts allege that by reason of the death the parents "of said deceased *have* suffered and will in the future suffer great loss and damage," and that "by reason of the premises and in accordance with the statutes in such case made and provided," "a right of action *has accrued to the plaintiff* as the personal representative of said deceased."

It will be also observed that neither of these counts as originally filed contained any allegation of pain or suffer-

ing to the decedent as a ground of action, and even as amended subsequently, as will hereafter be pointed out, contained no allegation that by reason thereof any cause of action had ever accrued to the decedent which had survived under the statute for the benefit of any one, or that any such claim was to be made the basis of the recovery sued for.

No demurrer was filed to this declaration: A plea of the general issue was filed on March 2, 1914, and issue was joined thereon on April 6, 1914.

On October 20, 1915, after this case had been assigned for trial, and after the statute had barred an action for damages to the decedent, the appellee, without objection from the appellant, was permitted to amend the fourth count of the declaration by inserting the words "*and causing him to suffer intense pain and injuries*" after the words "profuse hemorrhages" and before the words "in direct consequence whereof the deceased died," as appears on page eight of the Record. This still left the declaration without any allegation or any attempt to so change the allegations of the declaration as to assert that a right of action had accrued to the decedent prior to his death, which, under the Amendment of 1910, was for the first time allowed to survive to the personal representative of the decedent. The only assertion of damage sought to be recovered by the declaration as then amended still was for the pecuniary injury alone which accrued to the parents by reason of the loss of the contribution to the support of the parents which had resulted from the death.

All of the counts assert the right of action and make claim in the following words:

"Wherefore the plaintiff says that by reason of the premises and in accordance with the statutes in such cases made and provided the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal represen-

tative of said deceased on behalf of and for the benefit of the next of kin" (in the first and second counts, and 'on behalf of and for the benefits of the said and 'on behalf of and for the benefit of the said counts) 'and accordingly bring this suit and claims' in the first and second counts \$10,000, and in the third and fourth counts 'the sum of \$20,000.' "

No new pleading was filed to this first amendment, and no opportunity to plead afforded so far as the record shows.

On October 27, 1915, with the pleadings in this condition, the trial of this case was commenced.

After the jury was empaneled and sworn to try the issues between the parties, appellee's counsel stated that she elected to proceed for the purposes of the trial under the third and fourth counts of the declaration and the first and second counts were withdrawn (Rec., 6, 17).

On the completion of the appellee's testimony the appellant by counsel moved the Court to instruct the jury to return a verdict in its favor—

(a) Upon the ground that the evidence was not sufficient to maintain the case stated by the appellee in her declaration;

(b) That as a matter of law the pole situated thirty inches from the stanchion under the circumstances shown in this case was far enough away to relieve the company from any negligence;

(c) That the evidence showed the decedent was injured as the result of a risk assumed, and

(d) That there was no evidence to sustain any other assumption but that decedent was injured as the result of losing his foothold on the running-board.

But the court overruled the motion, to which action the appellant duly excepted.

At the conclusion of the entire case the appellant renewed its motion to have the court instruct the jury to

return a verdict in its favor, which motion the court again overruled, and the appellant again excepted.

The taking of the evidence was completed on October 28th (Rec., p. 9). After all of the evidence had been concluded and all witnesses discharged, and while the court was considering the prayers offered by both sides and after the appellee's counsel had, among others, offered their prayers "6" and "8" (R., pp. 62, 63), which authorized a recovery for conscious pain and suffering, and after the court had stated (Oct. 29th) to counsel for appellee that "I think you will have to amend before you can recover for pain and suffering" (Rec., p. 68), the court granted the motion of the appellee for leave to further amend the declaration by inserting in the fourth count after the words "resulting in the" the words "*conscious pain and suffering and in the,*" (Rec., p. 68), over the objection of appellant's counsel, upon the ground that it asserted a new cause of action and one barred by the limitation of the statute giving the cause of action, and because such amendment constituted a surprise to the appellant who had made no preparation on this question under its right to rely upon the pleadings (Rec., p. 68).

The appellant excepted to this ruling, and then asked for leave to plead to the amended declaration, which leave was granted, and then pleaded orally and informally "Not Guilty" and "limitations of the statute"; and counsel for appellee thereupon orally demurred to the plea of the Statute of Limitations, which demurrer the court sustained, and overruled the plea of limitation and the appellant again excepted.

Thereafter the court settled the prayers tendered on behalf of the appellee and appellant. The case was argued and the court charged the jury, permitting them to return a verdict not only for the pecuniary losses suffered by the decedent, but also for the decedent's conscious pain and

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suffering. The jury subsequently returned a verdict in solido for \$7,500, and judgment was entered therefor.

An appeal from this judgment was taken to the Court of Appeals of the District of Columbia upon assignments of error to be found in the Record at pages 13 and 14, but the judgment of the trial court was approved in all respects, and this case is now here upon a writ of error to that judgment and upon the same assignments of error, to-wit:

ASSIGNMENTS OF ERROR.

1. The court erred in refusing to direct a verdict for the defendant at the conclusion of the plaintiff's evidence.

2. The court erred in refusing to direct a verdict for the defendant at the conclusion of all of the evidence.

3. The court erred in applying the Federal Employers' Liability Law to the case stated in the plaintiff's declaration.

4. The court erred in applying the Federal Employers' Liability Law to the plaintiff's case under the evidence.

5. The court erred in granting the plaintiff leave to amend her declaration after all the evidence had been completed so as to permit a recovery by the plaintiff for conscious pain and suffering.

6. The court erred in refusing to grant the defendant a continuance of the case after permitting said amendment.

7. The court erred in sustaining the plaintiff's demurrer to the defendant's plea of the Statute of Limitations filed by leave following said amendment.

8. The court erred in granting the plaintiff's prayer No. 3-A.

9. The court erred in granting the plaintiff's prayer No. 4.

10. The court erred in granting the plaintiff's prayer No. 5.

11. The court erred in granting the plaintiff's prayer No. 6.

12. The court erred in granting the plaintiff's prayer No. 7.

13. The court erred in granting the plaintiff's prayer No. 8.

14. The court erred in refusing defendant's prayer No. I.

15. The court erred in refusing defendant's prayer No. III-A.

16. The court erred in refusing defendant's prayer No. IV.

17. The court erred in refusing defendant's prayer No. VII.

18. The court erred in refusing defendant's prayer No. IX.

19. The court erred in refusing defendant's prayer No. X.

20. The court erred in refusing defendant's prayer No. XII.

21. The court erred in permitting the jury to assess damages for conscious pain and suffering under the declaration as amended more than two years after the right of action accrued.

22. The court erred in overruling the defendant's motion for a new trial and entering judgment on the verdict in favor of the plaintiff.

ERRORS ASSIGNED ON PETITION FOR WRIT OF CERTIORARI.

It is also here upon a petition for a writ of certiorari in which substantially the same objections are briefly summarized as follows:

1. That the defendant was not a common carrier by railroad within the meaning of the Federal Employers' Liability Law of 1908.

2. The entire absence of any negligence on its part.

3. The death of decedent was caused either by his own negligence or

4. As the result of an accident, to-wit, his losing his footing while passing along the running-board.

5. That the risk of such injury was assumed.

6. That as to the conscious pain and suffering—

(a) The evidence did not show that decedent had undergone conscious pain and suffering;

(b) The Statute of Limitations barred such claim before the declaration asserting it was amended.

THE ERRORS NOW RELIED ON ARE AS FOLLOWS:

The evidence shows the appellant company not to be "a common carrier engaged in trade and commerce" in the District of Columbia and State of Maryland, as alleged in the declaration, within the meaning of the Federal Employers' Liability Law of 1908.

This affirmative rests upon the testimony of Mrs. Tarbell alone, who testified that she lived along this line some time back (Rec., p. 19):

Q. Do you know whether they haul freight on this line for people going up along there? A. Yes. (Rec., p. 22.)

Mr. Geo. G. Whitney, Chief Clerk of the Washington Railway and Electric Company, and familiar with its business, testified (Rec., p. 55), that the Washington Railway and Electric Company is not engaged in hauling freight for the public on the Glen Echo or Cabin John Bridge line and does not publish tariffs with the Interstate Commerce Commission or holds itself out to do any such business to his knowledge, and that he would have knowledge if they did so. Upon being cross-examined he testified further as follows:

Q. You say it does not haul anything but passengers on that line; it does not haul supplies for

people up there at times? A. I could not say it does not haul any freight, but it does not haul any for the public.

Q. But it does haul things up there for people living on that car line on its cars? A. People living on that line? No, sir.

Q. For anybody up there? A. Not for the public.

Q. What is that? A. It does not haul any freight for the public.

Q. Who does it haul for? A. It hauls freight for the Glen Echo Park Company.

Q. For the Glen Echo Park Company? A. Yes, sir.

And upon being further examined on redirect examination:

Q. Does the company receive any compensation for that service? A. It does not.

And upon being re-cross-examined:

Q. It receives all the fares of people going to Glen Echo Park, does it not? A. Of course that is true: the railroad company gets the fares.

Q. In consideration of that it does not make any special charge for the freight hauled up there; is that right? A. I would not say.

Q. You would not say, but it is a fact, is it not? A. No, sir.

Q. They own that right of way up there, the whole line, don't they? A. I think so. (Rec., p. 56.)

The question is raised by the action of the court in granting the appellee's prayers Nos. 3-A, 4, 5, 6, 7, 8 (Rec., pp. 61, 62, 63, 67), based upon the Federal Employers' Liability Law, and the action of the court in refusing the appellant's prayer No. VII (Rec., p. 65), and by assignments of error Nos. 1, 2, 4, 14, (Rec., p. 13).

Appellant's prayer No. VII reads as follows (Rec., p. 65) :

"The court instructs the jury that there was no duty on the defendant company to anticipate a negligent or unusual manner of performing his duty on the part of the servant, or to render the servant safe from injuries resulting from his negligent method of performing his duty or from unforeseen accidents or occurrences."

II.

Even if the evidence was sufficient to justify a finding on the part of the jury that the appellant company was a common carrier of passengers within the meaning of the Federal Employers' Liability Law, the court erred in directing the jury as a matter of law that the law did apply.

This question is raised by the appellant's exceptions to the appellee's prayers Nos. 4, 5, 6, 7, 8, all of which are based upon the Federal Employers' Liability Law (Rec., pp. 61, 62, 63), and read as follows :

No. 4.

"The jury are instructed that, if they find from the evidence that the defendant company was guilty of negligence, and the deceased was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat the plaintiff's right to a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the deceased. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the deceased is not a bar to plaintiff's right to recover in this suit, but it

goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of the deceased and the defendant. In other words, if the jury find that the defendant was guilty of negligence in this case, and that the deceased was guilty of contributory negligence, the plaintiff has a right to recover damages, but from these damages the jury should exclude in its verdict a proportional part of the damages corresponding to the deceased's contribution to the total negligence. The jury are also instructed that the burden of proving the contributory negligence of the deceased is on the defendant, and that before the jury are justified in diminishing the damages on account of contributory negligence of deceased, they must first find that the contributory negligence of deceased is established by a preponderance of the evidence."

No. 5.

"On the question of assumption of risk, the jury are instructed that there can be no recovery in this case if the deceased assumed the risk of injury. Assumption of risk is not the same as contributory negligence. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. And, in this case, you are instructed that the deceased only assumed such dangers as were normally and necessarily incident to his occupation; but that he did not assume risks of another sort, not naturally incident to his occupation and arising out of any failure of the defendant company to exercise due care with respect to placing the trolley pole a safe distance from the running-board of the car. Risks of this sort, arising out of any negligence of the defendant, the jury would not be justified in finding were assumed by the deceased, unless they find first that any negligence of the defendant in placing that particular pole the distance it was

from the running-board, and also the risk of danger therefrom to a person passing while on that running-board, under the circumstances of this case, were both alike known to the deceased, or were both so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated it."

No. 6.

"The jury are instructed that, if they find in favor of the plaintiff, then in assessing the amount of damages for the benefit of the mother and father, they may assess these damages both on account of any conscious pain and suffering and agony of their son from the time of the injury to the time of his death, **and also** for any loss and damage resulting to them financially by reason of the wrongful death of their son. In other words, the plaintiff, if you find in her favor, is entitled to have the damages for the benefit of the mother and father assessed by you on account of two claims which are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, the son, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, his mother and father, and is confined to their pecuniary loss through his death. One begins where the other ends. You cannot, however, assess the total amount of damages for both claims to exceed the sum of \$20,000, and you need not, if you find a verdict for the plaintiff, render a separate verdict for each of the two claims, but one amount, not exceeding \$20,000, to embrace the amounts found by you for both claims.

No. 7.

The jury are instructed that, if they find in favor of the plaintiff, then in assessing the damages for the benefit of the mother and father resulting to them financially by reason of the wrongful death of

their son (which damages are separate from any damages you may find for the son's pain and suffering before he died), you are entitled to take into consideration the relationship between them of parents and son, as a proper circumstance for consideration in computing these damages, which are not dependent upon any legal liability of the son to support his parents. The jury may also take into consideration any testimony concerning the personal qualities of the son and the interest he took in his mother and father, and any testimony concerning the care, attention, consideration, maintenance and support, which he reasonably might have been expected to give to his parents, but to include the pecuniary value of all these in the damages. In other words, the jury are entitled to take into consideration in assessing the damages on this claim, which is separate from the claim for the son's suffering and pain before he dies, only such losses as the jury may find result to the mother and father because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of their son, and the fact that the son was not legally liable at the time of his death, and would not have been legally liable after he attained his majority to support his mother and father, cannot defeat their claim for damages.

No. 8.

"The jury are instructed that, if they find in favor of the plaintiff, then in assessing the damages for the benefit of the mother and father for the son's personal loss and suffering before he died, which are separate from any damages they may find resulting to them financially by reason of the death of their son, you are entitled to take into consideration any testimony in the case concerning any conscious pain and suffering endured by the son in the period between injury and death. In other words, if the jury find in favor of the plaintiff, then, in addition to any damages for pecuniary loss to the parents, the plain-

tiff is entitled to recover damages for the benefit of the mother and father for any conscious pain and agony which the jury may find their son endured in the period between his injury and death; and, in computing those damages for the benefit of the mother and father on account of any suffering of the son, those damages are to be measured by the jury not by the suffering of the mother and father in contemplating or grieving over any pain their son may have suffered, but those damages are to be measured by the jury from the view point of the son; that is to say, the jury may compute such damages as will be reasonably compensatory to the son for his conscious pain and agony which the jury may find he suffered in the period between injury and death, and the fact that that period may have been brief does not, of itself, defeat the claim for damages on account of the son's conscious suffering.

III.

The court erred in permitting the pleading to be amended so as to permit recovery for conscious pain and suffering after all of the evidence had been concluded, all of the witnesses on each side discharged, and while the settlement of the prayers was under discussion.

This amendment with the consequent direction to the jury to allow for pain and suffering should not have been allowed—

- (a) Because it introduced a new cause of action.
- (b) Because the right of compensation for conscious pain and suffering, if it ever existed, had been barred by the Statute of Limitations before the amendment:
- (c) Because there was no sufficient evidence to warrant the submission of that question to the jury;
- (d) Because even after the amendment the claim for conscious pain and suffering was not sufficiently asserted.

This question was raised by the exception to the action of the court in permitting the amendment (Rec., pp. 67, 68), and is covered by the fifth assignment of error (Rec., p. 13).

IV.

The Court Erred in Overruling the Motion of the Appellant for a Continuance of the Case after the Amendment had been Allowed.

This question is raised by the exception of the appellant to the action of the court in overruling its motion for a continuance, notwithstanding the statement of the court that "I will frankly say that if I had been reading that declaration from the standpoint of the defendant I would not have suspected that it was the intention to recover for the conscious pain and suffering of this man after he lived, if he lived an hour after his injuries."

This question is raised by the exception to the ruling of the court (Rec., p. 65), and by the sixth assignment of error (Rec., p. 13).

V.

The Court Erred in Sustaining the Appellee's Demurrer to the Appellant's Plea of the Statute of Limitations.

This question is raised by the exception to the action of the court in sustaining said demurrer (Rec., p. 68), and by the seventh assignment of error (Rec., p. 13).

VI.

**The Court Erred in Overruling the Appellant's Motion
to Direct a Verdict in Its Favor at the Conclusion
of the Appellee's Case and at the Con-
clusion of the Entire Evidence.**

This question is raised by the exception to the action of the court in overruling both of these motions (Rec., pp. 41, 60). It is also covered by assignments of error 1, 2 and 14 (Rec., p. 13).

VII.

**The Court Erred in Granting the Appellee's Prayer
No. 3-A, Reading as Follows:**

"The jury are instructed that the law imposes upon every employer the duty of exercising reasonable care in providing a place reasonably safe and secure in which employes may carry on and perform their respective duties, and that if the jury find from the evidence in this case that the defendant company located and placed the pole, to wit, No. 187, supporting the trolley wire of the defendant company, dangerously close to its tracks and passing cars, and further find that the deceased conductor was knocked from the running-board of the car by the said pole and thereby injured and killed, then their verdict should be for the plaintiff, unless such danger from the location of said pole, if any, was so obvious that an ordinarily prudent person under the circumstances would have appreciated it" (Rec., p. 67).

This is raised by the appellant's exception to said prayer (Rec., p. 68), and assignments of error 8 (Rec., p. 13).

VIII.

The Court Erred in Stating the Doctrine of Assumption of Risk Under the Federal Employers' Liability Law in the Appellee's Prayers, Nos. 3-A and 5 (Rec., pp. 61, 67).

The question is raised by the exception of the appellant to the granting of these prayers (Rec., p. 66), and by the eighth and tenth assignments of error (R., p. 13).

IX.

The Court Erred in Granting the Appellee's Prayers Nos. 6, 7, 8.

The propriety of these rulings of the court is raised by the appellant's exceptions to the granting of these prayers (Rec., p. 66), and by assignments of error Nos. 11, 12, 13, and are set out at length, ante, pp. 20-22.

X.

The Court Erred in Refusing the Appellant's Prayer No. III-A (Rec., p. 67), which read as follows:

"If the jury believe from the evidence that the plaintiff's decedent received his injury by reason of failure to grasp one of the stanchions or losing his footing as he passed along the running-board, thereby protruding his body further than usual beyond the outside line of the car and thus causing his body to come in contact with a trolley pole, their verdict should be for defendant."

The question is raised by the appellant's exception to the ruling of the court in refusing this prayer (Rec., p. 66, and also by assignment of error No. 15 (Rec., p. 13).

XI.

**The Court Erred in Refusing the Appellant's Prayer
No. IV (Rec., p. 64).**

This prayer reads as follows :

"The court instructs the jury that some employments are necessarily fraught with danger to the workmen engaged therein, and that such dangers as are ordinarily incident to the employment as it is actually and ordinarily conducted and are obvious to a man exercising ordinary care for his own safety are presumed to be assumed by the employee, whether he was actually aware of them or not; and even as to dangers and risks not necessarily incident to the occupation but which may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and which are obvious to ordinary observation an employee, as soon as he becomes familiar with the place of his work and the conditions surrounding the same, without objection, is likewise presumed to have assumed."

The question is raised by the appellant's exception to the action of the court in refusing this prayer (Rec., p. 66), and by the sixteenth assignment of error.

XII.

**The Court Erred in Refusing the Appellant's Prayer
No. VII, as Follows:**

"The court instructs the jury that there was no duty on the defendant company to anticipate a negligent or unusual manner of performing his duty on the part of the servant, or to render the servant safe from injuries resulting from his negligent method of performing his duty or from unforeseen accidents or occurrences."

This question is raised by the appellant's exception to this ruling (Rec., p. 66), and is the subject of the seventeenth assignment of error.

XIII.

The Court Erred in Refusing the Appellant's Prayer No. IX.

This prayer reads as follows (Rec., 65):

"The court instructs the jury that even though they believe from the evidence that the defendant was negligent in placing its trolley poles in dangerous proximity to its tracks, yet, if the jury further believe from the evidence that the location of the said trolley poles was known to the plaintiff's decedent, or that he had been working as a conductor on the cars of the defendant company passing those trolley poles at frequent intervals for several months, and that the poles had been located at the same place for many years prior to the accident and that the decedent had failed to make complaint or objection on account of the location of said trolley poles, then he assumed the risk of danger from their location, if there was any danger in it, and the jury should return their verdict for the defendant."

This question is raised by the appellant's exception to the action of the court in refusing said prayer (Rec., p. 66), and is made the subject of the eighteenth assignment of error.

XIV.

The Court Erred in Refusing the Appellant's Prayer No. X.

This prayer reads as follows:

"Even though the jury may believe from the evidence that the Plaintiff is entitled to a recovery as the result of negligence on the part of the Defend-

ant, still the jury has no right to allow the Plaintiff speculative, imaginary or conjectural damages, or any damages which are not fairly and satisfactorily established by a preponderance of the evidence, to be justly compensatory for pecuniary injuries actually inflicted on and suffered by the next of kin of the decedent as a direct and proximate result of the decedent's death" (Rec., p. 66).

The question is raised by the appellant's exception to the refusal of the court to grant this prayer (Rec., p. 64), and is made the subject of the nineteenth assignment of error.

PRELIMINARY.

Preliminary to a discussion of these points and by way of anticipating possible objections and discussion of the appellee, we would say that in the brief filed by the learned counsel for appellee in the Court of Appeals that they devoted at least one-half of their 137-page brief to technical discussions as to the sufficiency of the various exceptions in the trial court and of the assignments of error filed thereon to support, under the rules of that court, the points made.

A complete answer to any attempt to renew these objections here is to say that the Court of Appeals in its opinion entirely ignored all of said objections, none of which in fact were well taken, and passed upon all of the assignments on their merits, thus holding them sufficient under its rules. This, as we understand it, precludes the necessity for giving any consideration here to these pure technicalities.

DISCUSSION OF POINTS OF LAW AND FACT.

The points now relied on all involve the construction and application to the facts of this case of the Employers' Liability Law of 1908 as amended; whether the present action can be maintained only under Sections 1, 3, 4, 5 and 9 of

the act, and hence involves the construction of a general statute of the United States, as has been demonstrated in the brief filed herein by the appellant in opposition to the motion to dismiss, or whether it may be maintained under Section 2 alone unaided by any other section, and hence involves the construction of a local statute only.

They may best be discussed under four general headings and subdivided as follows:

I. The application of the Federal Employers' Liability Law of 1908 to the case stated and to the case proved (Assignments 1, 2, 3, 4, 14):

- (a) The appellant company as a matter of law cannot under the evidence be held to be a common carrier by railroad within the meaning of Section 1 of the Act of Congress of April 22, 1908 (Assignments 3, 4).
- (b) At the most that question was one of fact which should have been submitted to the jury and not determined for the jury by peremptory instructions as was done by granting appellee's prayers Nos. 4, 5, 6, 7, 8, all of which assumed as matter of law the appellant to be a common carrier by railroad within the meaning of the Federal Statute, and as such applied to the case (Assignments 9, 10, 11, 12, 13).

II. The action of the trial court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering (Assignments 4, 5, 6, 7, 11, 12, 13, 19):

- (a) Because after all the evidence had been taken and all witnesses discharged, the court undertook to allow the pleading to be so amended as to introduce a new cause of action (Assignment 5);
- (b) Which was already barred by limitation of the statute which permitted the cause of action to survive (Assignments 5, 21);
- (2) There was no sufficient evidence before the jury to warrant a recovery therefor even if properly pleaded (Assignments 11, 13, 19);

- (d) The declaration even as amended failed to assert sufficiently a claim for such pain and suffering (Assignments 3, 19);
 - (e) The allowance of the amendment operated a surprise and the appellant's motion for a continuance should have been granted (Assignments 5, 6);
 - (f) The appellee's demurrer to the appellant's plea of the statute of limitations should not have been sustained (Assignment 7).
- III. There was no evidence of negligence on the part of the appellant resulting proximately in the death of appellee's decedent. Hence the court erred in failing to direct a verdict for appellant at the conclusion of the appellee's evidence and again at the conclusion of all the evidence (Assignments 1, 2, 3, 4, 8, 14):
- (a) Because the appellee's own evidence contradicted showed that the decedent came in contact with the pole after he lost his footing, and that he did not lose his footing because the pole struck him;
 - (b) Because the line of poles was not negligently placed dangerously near the tracks as alleged in the declaration;
 - (c) It is not negligence for an electric railway to maintain permanent and visible structures in close proximity to its tracks.
 - (d) Because whatever dangers resulted from the proximity of the poles to the track was inherent and obvious; the decedent had ample opportunity to observe and appreciate the danger, and therefore assumed the risks resulting therefrom.
- IV. Even if there was evidence on any of the above points to sustain a finding of the jury against the appellant, such evidence merely raised disputed questions of fact thereon and the court erred in instructing the jury peremptory in regard thereto in the following respects:
- (a) In granting appellee's prayers 3-A and 5,

and in refusing appellant's prayers III-A, VII and IX. (Assignments 8, 10, 15, 17, 18.)

- (b) In refusing appellant's prayer IV in respect to the facts from which both knowledge and assumption of risks are assumed. (Assignment 16.)

The Court Erred in Refusing Appellant's Prayer X.

I.

The application of the Federal Employer's Liability Law of 1908 to the case stated and to the case proved (Assignments 1, 2, 3, 4, 14):

- (a) The appellant as a matter of law cannot be held to be a common carrier by railroad within the meaning of Section 1 of the Act of Congress of April 22, 1908 (Assignments 3, 4):

The charter of this appellant (29 Stats. at L., 246), which was introduced in evidence by the appellee (Rec., p. 33), expressly prohibits the appellant company from operating steam cars, locomotives or passengers or other cars for steam railways. The evidence already set forth (*ante*, pp. 16-17) as well as its charter, show that it was chartered as and only did the business of a street railway company, and carried no freight.

The counts of the declaration drawn under the District statute allowing actions for death resulting from a wrongful act having been withdrawn, left only the two counts drawn under the Federal Employers' Liability Law standing, and every prayer granted at the instance of the appellee is maintainable only upon the theory that the Federal Employers' Liability Law is applicable to the facts shown. It is therefore plain that if this act is not applicable to the case made out that the judgment must be reversed.

The position of the appellant in this respect is (a) that it is not a common carrier, and (b) that the Federal Employers' Liability Law is not applicable to electrically operated street and suburban railways.

Section 1 of the act of 1908 applies only to "common carriers by railroad."

In *N. Y. C. & H. R. R. Co. vs. Shirley*, 120 N. Y. (Supp.), 192, it is held that common carriers are only carriers of property unless from the context it appears that carriers of persons are intended, and that when carriers of persons are spoken of they are usually designated as "common carriers of persons" or "passenger carriers," and it was held in that case that an act providing that no preference for the transportation of the business of a common carrier upon the cars, in the depots or upon the grounds shall be granted, that the act must be limited to carriers of freight, and hence did not include hackmen.

The Court of Appeals of New York in *Brewer vs. The Railway Company*, 45 Hun, 595, 26 N. E., 325, 11 L. R. A., 485, 21 Am. State, 647, said:

"It is true that a carrier of persons is not subjected by law to the obligations of a 'common' carrier in the strict sense of the term applicable to it."

In *Central R. R. of Georgia vs. Lippman*, 110 Ga., 665; 50 L. R. A., 673, the construction of Section 2276 of the Civil Code of that State was involved. It reads as follows:

"A common carrier can not limit his legal liability by any notice given either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby."

The defendant sold passenger tickets expressly limiting its liability. The court said:

"Undoubtedly if a carrier of passengers is a common carrier within the contemplation of this section of the code, and if the term 'legal liability' refers to the legal obligation of carriers of passengers to exer-

cise extraordinary diligence to protect the lives of persons and passengers, then while the carrier may not limit such liability by notice, he may do so by an express contract. * * * It is significant that under this section the carrier who may limit his legal liability by express contract is denominated 'a common carrier.' * * * The term 'common carrier' did not at the common law embrace a carrier of passengers, neither does it under the definition found in the Code in connection with Section 2276."

Bouvier, *Hutchison on Carriers*, Sec. 47, and *Greenleaf on Evidence*, Vol. 2, Sec. 211, all define common carriers as "carriers of personal property purely," and that carriers of passengers are denominated "common carriers of passengers" or "passenger carriers."

Assuming, however, that a suburban street railway company operated by electricity and carrying passengers only is a common carrier, the question still remains: Is it a "rail-road" within the meaning of the Act of April 22, 1908?

That laws, such as the Federal Employers' Liability Law, are construed strictly is shown by the rulings of courts of last resort, of Iowa in *McLeod vs. Chicago*, etc., Railway Co., 125 Iowa, 270; Massachusetts in *Fallon vs. West End Street Railway Company*, 171 Mass., 249, 50 N. E., 536; Minnesota in *Lundquist vs. Duluth Street Ry. Co.*, 65 Minn., 387, 67 N. W., 1006; *Funk vs. St. Paul Street Ry. Co.*, 61 Minn., 435, 52 Am. St., 608, 29 L. R. A., 208; Missouri in *Sams vs. St. Louis & Merrimac R. R. Co.*, 174 Mo., 53, 61 L. R. A., 475; *Godfrey vs. St. Louis Tourist Co.*, 107 Mo., 193, and *Johnson vs. Metropolitan Street Railway Company*, 104 Mo. Appeals, 588; Texas in *Riley vs. The Galveston City Railway Co.*, 13 Texas Civ. App., 247, and Virginia in *Norfolk Traction vs. Ellington*, 108 Va., 245, all construing fellow servant laws similar in effect and purpose to the Federal Employers' Liability Law as applying purely to steam railroads and not to street railways or suburban

railways operated by electricity. In *Funk vs. Railroad Company*, 61 Minn., 435, 29 L. R. A., 208, mentioned above, the law construed applied to "every railroad corporation." The court said:

"Perhaps it may be conceded that, technically speaking, the term railroad would include a street railway so far as its roadbed was made of iron or steel rails for wheels of cars to run upon * * *

"When the words of a statute are not explicit the intention is to be collected from the context, from the occasion and necessity of law, from the mischief felt, and the object and remedy in view. * * * Can it be fairly and reasonably held that it was a legislative intent to apply the term railroad to street railways? It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. A street car is generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do *street railways carry freight*. The greatest railroad hazard and danger of personal injury to railroad employes arise from operating their trains. There is no such danger in operating street railways, whatever may be their motive power, because they do not carry freight. Especially is the danger in coupling their cars entirely absent."

The court concludes that street railways, though within the technical meaning of the terms used, were not within the mischief felt which resulted in the passage of the law and therefore were not within the legislative intent.

In *Sams vs. The Railway Company*, 174 Mo., 53, 61 L. R. A., 475, the statute applied to "every railroad corpora-

tion." The defendant had been incorporated as an ordinary railroad company with the power of eminent domain. It was shown that it had exercised the right of eminent domain to acquire part of its railway; that its road in the city was in the city streets, and of the same character as ordinary street railways, while in the country it was partly of that character and partly of the character of the ordinary steam railroads, and the cars were moved by electricity with trolleys, and for carrying passengers only, except that the defendant had one car propelled as its passenger cars were, which was used to carry the United States mails and one-half of it was arranged to carry freight or express packages and was so used. The court said:

"It is the peculiar nature of the hazard incident to the railroad business that makes the foundation of this statute. Reference to this peculiarity runs through all the cases sustaining the validity of the fellow-servants statutes.

"In *Railway Company vs. Ellis*, 165 U. S., 150, Mr. Justice Brewer said: 'The business in which they are engaged is of a peculiarly dangerous nature and the liability in the exercise of its police power may justly require many things to be done by them in order to secure life and property.'

"In *Lavalee vs. Railway Company*, 40 Minn., 263, 41 N. W., 974, the court said: 'The frequency and magnitude of the dangers in which those employed in operating *railroads* are exposed; the difficulty, sometimes impossibility, of escaping from them, with any amount of care, when they come; the fact that a great number of men are employed, cooperating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may not be said to voluntarily assume the risk arising from the want of skill or care by any one of the number, are sufficient reasons for applying a rule of liability on the part of the employer to the employee so em-

ployed, different from that ordinarily applied between master and servant.'

"But no reason can be suggested why such difference should be founded, not on the character of the employment, nor of the danger to which those employed are exposed, but on the character only of the employer.

"In *Johnson vs. The Railroad Company*, 43 Minn., 222, 8 L. R. A., 419, where the court was considering what employes were within the scope of the fellow-servants statute, said : 'Therefore, after mature consideration, our conclusion is that if any limitation is to be placed by the courts upon the application of this statute, and upon constitutional grounds there must be, the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of *railroads* and whose injuries are the result of such dangers . . . Men engaged in the operation of *street railways* are exposed to hazards, but *not* to the *peculiar* hazards which distinguish men engaged in operating *steam railroads* and which have made them a class for special legislation."

In *Norfolk Traction Company vs. Ellington*, 108 Virginia, 245, the Court of Appeals construed the Virginia Fellow-servant Act, sec. 162, Virginia Constitution, which applied to "every employe of a *railroad company* engaged in the physical construction and repair or maintenance of its roadbed . . . or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car, or engine," and said :

"If, therefore, it be conceded that the word 'railroad' in its broadest signification, would include both street railways and steam railroads,

nevertheless a critical examination of the language of section 162 and other portions of the constitution and laws of the State in *pari materia*, aided by the history and spirit of the provision, lead to the conclusion that the words '*railroad company*' as employed in that section, were only intended to apply to *railroads proper, or commercial railroads.*"

The Virginia court gives an enlightening comparison showing the "inherent dangers of the respective businesses of *railroad* companies proper and *street railway* companies" as illustrated by statistics taken from the reports of the State Corporation Commission of Virginia, and says:

"In 1903 on steam railroads out of a total of 2789 persons killed or injured by accident, 2319 were employes. On electric railways out of a total of 493 persons killed or injured by accident, 9 were employes. In 1904, on steam railroads, out of a total of 2781 persons killed or injured by accidents, 2264 were employes. On electric railways out of a total of 206 persons killed or injured by accidents, 9 were employes. In 1905 on steam railroads out of a total of 1812 persons killed or injured by accident, 1353 were employes. On electric railways out of a total of 230 persons killed or injured by accident, 19 were employes. And in 1906 on steam railroads out of a total of 2277 persons killed or injured by accident, 1775 were employes. On electric railways out of a total of 203 persons killed or injured by accident, 27 were employes. * * * It is also worthy of notice that while the dockets of this court abound with fellow-servant cases occurring on steam railroads we recall but one instance of the kind in connection with electric railways."

These statistics illustrate most aptly the contention that the risk of injury to employes upon street railways could in no legitimate way have figured in the public sentiment

which resulted in the enactment of the Federal Employers' Liability Law, either of 1906 or 1908.

Practically the same question here involved was presented to the Court of Appeals in the case of Railway Company vs. Downey, 40 App. D. C., 147, which case arose under the act of 1906 and in which that court overruled the contention now being made as to that act, upon two grounds; first, "upon the uncontradicted testimony" in that case that "the defendant is both a carrier of passengers and freight;" second, the language quoted from the Second Employers' Liability Case upholding the constitutionality of the law of 1908 that "the term 'commerce' comprehends more than the mere interchange of goods. It embraces commercial intercourse in all its branches, including the transportation of passengers and property by common carriers, whether carried on by land or water."

The act of 1906 applied to "every common carrier engaged in trade or commerce," while the present act is confined to common carriers by railroad "while engaged in commerce."

But it is submitted with very great respect that that quotation does not justify the conclusion that every one engaged in *commerce* is subject to the liabilities of either the act of 1906 or the present act, and that in order to come within the provisions of the act of 1908 there must not only be an engaging in commerce but there must be an engaging in commerce by a common carrier; that that carrier must be a carrier by railroad, and that a mere carrier of passengers by street railway under the authorities first above cited is not such a common carrier.

That court also, in support of its conclusion, cited the case of Omaha & Council Bluff St. Ry. vs. Interstate Commerce Commission, 191 Fed., 40. Since then the case so cited was brought to this court and reversed in 230 U. S., 324. Mr. Justice Lamar delivered the opinion of the court

On page 334, referring to the original Interstate Commerce Act, he said:

"The statute in terms applies to carriers engaged in transportation of passengers or property by railroad."

It will be seen that this is very different from the terms used in the Federal Employers' Liability Law of 1908, which applies not to "common carriers whether engaged in the transportation of passengers or property," but is confined to "common carriers by railroad."

Mr. Justice Lamar then continues:

"But in 1887 that word (railroad) had no fixed and accurate meaning for there was *then as now* (*sic*) a conflict in the decisions of the state courts as to whether *street railroads* were embraced within the provisions of a statute giving rights or imposing burdens on *railroads*. . . . The present record discloses a similar disagreement in Federal tribunals. For not only did the commerce court and the circuit court differ, but it appears that the members of the commission were divided on the subject when this case was decided and also when the question was first raised in *Willson vs. Rock Creek R. Co.*, 7 Inters. Com. Rep., 83.

"This conflict is not so great as at first blush would appear. For all recognize that while there is a *similarity*, between railroads and street railroads there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word 'railroad' includes 'street railroad,' unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that 'railroad' does not include 'street railroad' unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, 'a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is

from a road. *Louisville & P. R. Co. vs. Louisville City R. Co.*, 2 Duv. (Ky.), 175. . . .

"If the *scope* of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include 'street railroad.' On the other hand, if the act was aimed at railroads proper, then 'street railroads' are excluded. . . .

"It is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually connected with other railroads which themselves are further connected with others, so that *freight may be shipped, without breaking bulk, across the continent*. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, *even though that community be divided by state lines, or under different municipal control*. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. . . .

The railroads referred to in the act were not those having separate, distinct, and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

It is also true that the case of *Railroad Company vs. Downey*, subsequent to its decision by the Court of Appeals, was brought to this court on a writ of error; but this court declined and refused to pass upon the very questions now presented in this case, upon the distinct ground that the act of 1906 after its emasculation by having been declared unconstitutional so far as it affected interstate commerce, became a mere local statute and that it was therefore with-

out jurisdiction to review the construction placed upon it by the Court of Appeals.

In *Hughes vs. Indiana Traction Company*, decided by the Supreme Court of Indiana, June 3, 1914, and reported in 105 N. E., at p. 537, construing the Indiana Co-Employees' Liability Act of 1908, applying to "every railroad or other corporation in the State," it was held that street railways could not be included under the term "other corporations," and that it:

" . . . does not, in view of a long course of legislation and judicial decisions recognizing the distinction between *steam railroads* and *street and interurban railroads*, apply to an interurban railroad company operated by electricity, for *railroad* companies operate long trains controlled by numerous servants, while *trains on interurban lines generally consist of a single car operated by two servants.*"

Citing, in addition to a long line of Indiana cases, *Sams vs. St. Louis, etc., R. Co.*, 174 Mo., 53, 73 S. W., 686, 61 L. R. A., 475; *Norfolk, etc., Traction Co. vs. Ellington*, 108 Va., 245, 61 S. E., 779, 17 L. R. A. (N. S.), 117.

In this case the court, quoting from a prior Indiana decision, says:

"It is quite true that an electric railroad, as we now know such roads, might be called a railroad; but, as was said in *Bridge Proprietors vs. Hoboken Co.*, 1 Wall., 116, 17 L. Ed., 571: 'It does not follow that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, the thing so styled is really the thing formerly meant by the familiar words. . . . The track on which the steam cars now transport the traveler or his property is called a road; sometimes, perhaps generally, a railroad. The term road is applied to it, no doubt, because in some sense it is used for the same purpose

that roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it, from any previous use of the word road.

"In discussing the expression 'upon a railway' as used in the act, the author of *Dressers Employers' Liability*, sec. 80, says that the expression means a *steam railway* or one originally operated as such. *This section of the act was passed to meet the dangers arising from steam railroads*, and it was enacted at a time before electric railways had been adopted, or street railways had become a source of public danger."

"See, also, *Whatley vs. Zenida Coal Co.*, 122 Ala., 118, 26 South., 124; *Jarvis vs. Hitch*, 161 Ind., 217, 67 N. E., 1057."

It is to be remembered that at the time this legislation was enacted the Congress of the United States was following similar legislation enacted by a large number of the States of the Union. After the question had arisen and been decided in a number of them as to whether or not these previously enacted laws applied to electric railways or not, Congress did not see fit to put any language into its enactment expressing a purpose to extend it to street railways doing an interstate business. It must be presumed that it acted with knowledge of these decisions in thus adopting this legislation under the principle that when one State adopts legislation originally adopted in another State which has been the subject of judicial construction, that in so adopting it adopts as a part of the law the construction which has been placed upon such law in the State of its origin. Applying this principle to the case at bar, it would appear clear that the Federal Employers' Liability Law of 1908 was not intended to apply to street railways.

- (b) At the most that question was one of fact which should have been submitted to the jury and not determined for the jury by peremp-

tory instructions as was done by granting appellee's prayers Nos. 4, 5, 6, 7 and 8, all of which assumed as matter of law the appellant to be a common carrier by railroad within the meaning of the Federal Statute, and as such applied it to the case (Assignments 9, 10, 11, 12, 13).

Even should it be held, that if the Washington Railway and Electric Company, in addition to doing a purely passenger business was also engaged in carrying freight or in other activities or methods, that it would constitute it a common carrier.

In discussing this question in the Court of Appeals, counsel for appellee apparently admitted that the great weight of *State* decisions on this point upheld the contention of the appellant, stating on their brief (p. 23) :

"Appellant's brief cites and quotes from a great number of *State* decisions * * *

and comfort themselves in regard thereto thus :

"How does it avail appellant to cite a hundred or more decisions of *State* Courts, construing their own local statutes, as stars to guide this Court in construing a Federal Statute, when those *State* decisions must fade away as the stars of night in the bright sunlight of the illuminating *contra* decisions of the Supreme Court of the United States, casting their rays of reasoning fairly and squarely on the disputed question?"

The opinions of the Supreme Court of the United States, to which the learned counsel here to touchingly refer, are the cases of *Omaha & Council Bluff Street Ry. Co. vs. Interstate Commerce Commission*, 230 U. S., 324, which they further say "was studied with great care;" *McAdow vs.*

Kansas City W. Ry. Co., 164 S. W., 188, subsequently affirmed by this Court in 240 U. S., 51; Spokane, etc., Ry. Co. vs. United States, 210 Fed., 243, subsequently affirmed in 241 U. S., 344, and Spokane, etc., Ry. Co. vs. Campbell, 217 Fed., 518, since affirmed in 241 U. S., 497; United States vs. B. & O. S. W. Ry. Co., 226 U. S., 14.

We will briefly consider each of these cases to show that none of them except the Omaha & Council Bluffs Case has any application to the case at bar.

The case of United States vs. B. & O. S. W. R. Co., 226 U. S., 14, did not pass on the question as to whether an electric railway was a "railroad" within the meaning of the Federal Employers' Liability Law of 1908 or not. That question was not presented. The question there was whether or not the Interstate Commerce Commission had jurisdiction to order switch connections and an interchange of traffic between the steam railroads in question and the Cincinnati & Columbus Traction Company, an interurban electric railway. The Court said through Mr. Justice Holmes (p. 18):

"The line of the Traction Company is an 'inter-urban' electric railway for passengers and some *freight*, running under a state charter between Norwood and Hillsboro, through the middle of the diamond enclosed by the steam roads, (with which it was seeking switching connections), and authorized to go on to Columbus * * *. The Traction Company applied to the Commission for switch connections and they were ordered as we have said."

The Court continues:

"Some technical objections were raised, but the substantial question is whether the Traction Company is a 'lateral branch line of railroad' within the meaning of the first section of the act to regulate commerce, amended by Act of June 8, 1910."

After discussing this question, the Court held:

"The Traction Company is not within this class. It is an independent venture, in its general course parallel to, *more or less competing with, the steam roads, and working on a different plan.*"

And thereupon affirmed the action of the Commerce Court in reversing the action of the Interstate Commerce Commission which ordered the switch connections to be made.

It is hard to conceive how this case could be cited for authority for a proposition in no way involved. As far as the particular point which was decided goes, it tends rather against the contention of the appellee than in her favor.

The cases of *Spokane, etc., R. Co. vs. United States*, 211 U. S., 344, and *Spokane, etc., R. Co. vs. Campbell*, 241 U. S., 497, are neither in point. The first involved a construction of the Safety Appliance Act; as to whether or not it was applicable to the electric railway there in question. The court held that it was. But that railway is as different from the street car system of this appellant as this appellant's lines are from a steam railroad.

Mr. Chief Justice White there said (p. 346):

"The railroad company operated a street railway system in Spokane, Washington, and several *inter-urban electric* lines, one of which extended from Spokane to Coeur d'Alene, Idaho, a distance of about 40 miles. Over this line passenger *trains* composed of *two or more cars* were operated, starting at a station near the center of Spokane and running for a mile and a quarter on the street railway tracks to the company's yards near the city limits, and thence over its private right of way to Coeur d'Alene. The road was standard gauge, with rails of standard weight, and the passenger trains were made up according to standard railroad rules, with markers to designate the trains, and were run on

schedules and by train orders. Passengers traveled on tickets entitling them to ride to and from designated stations, at which regular stops were made, and *express matter and baggage* were carried on the passenger trains. The street car business was entirely separate from that done by the interurban line, the employes of the one having nothing whatever to do with the other. * * * In addition to its passenger trains, *the interurban line also operated freight trains*, which, however, started from the company's yards and ran directly to Coeur d'Alene, and did not, therefore, enter upon the street railway tracks.

"The fifteen cars here in question were passenger cars, and *on the day named were used in passenger trains* which were run from the station in Spokane to the city limits, and *thence over the company's right of way to Coeur d'Alene*. Twelve of them * * * were cars regularly used on the interurban lines. * * * The other three were large street cars which were regularly used only on the street railway tracks, but which, because of unusually heavy traffic on the day named, were coupled together with link and pin couplers and *operated as a train to Coeur d'Alene*."

None of these cars complied with the requirements of the Safety Appliance Act. This court said:

"The contention is that as the trains in which the fifteen cars were hauled were operated over the street railways tracks from the station in Spokane to the yards of the company, they were 'used upon street railways,' and were hence expressly exempted from the requirements of the act by the amendment of 1903" (which exempted from the provisions of that act trains, cars and locomotives which are used upon street railways).

The court very properly said that this contention was without merit, and held that in order to be entitled to the

exemptions the cars must be used *exclusively* upon street railways.

The Campbell Case involved the same road and was a suit by an employe, Campbell, who was a motorman in charge of a special train running between *Spokane* and *Coeur d'Alene*, made up of a combined motor and *passenger* car and *two trailers*. The train was equipped with Westinghouse air brakes which were out of order. The court held there that the railroad in question was within the provisions of the Safety Appliance Law and the Employers' Liability Law.

The McA Dow Case does not sustain the point to which it was cited by the appellee and by the Court of Appeals in its opinion in the instant case. Mr. Justice Holmes, who delivered the opinion for this court, said (p. 53):

"The defendant was a Kansas corporation having an electric railway from *Leavenworth* into *Kansas City*, Kansas. It had a traffic agreement with the Metropolitan Street Railway Company operating street railways in Kansas City, Missouri, by which *the latter was to receive the cars of the former, carrying passengers and freight.*"

In the opinion of the court, it was said:

"The defendant's road appears to be of the class of the traction company that was before the court in *United States vs. Baltimore & Ohio S. W. R. Co.*, 226 U. S., 14, and that was excepted from the decision in *Omaha & C. B. Street R. Co. vs. Interstate Commerce Commission*, 230 U. S., 324, 337. *Such* roads have been held to be within the act of Congress. *Spokane & I. E. R. Co. vs. Campbell*, 133 C. C. A., 370, 217 Fed., 518. * * * But these questions really are immaterial here since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case. In such circumstances it is unnecessary to decide which law applied."

But waiving the point that this court did not finally pass on the point now at issue in the case just cited, and treating the extract quoted as if it terminated with the sentence "Such roads have been held to be within the act of Congress," and citing *Spokane, etc., R. Co. vs. Campbell* in support thereof, it is plain that the *Spokane, etc., R. Co.* as the same is described in the two *Spokane* railway cases already cited, is not *merely* a street and suburban railway company engaged purely in city and suburban passenger traffic as the appellant here is, but that it was a commercial railway engaged in the transportation of passengers and freight as fully and as comprehensively as any ordinary railroad, the only difference being that its trains were propelled by electric motors rather than steam locomotives.

It is also clear from a perusal of this extract that the particular character of railway, within the provisions of the Employers' Liability Law and the Interstate Commerce Law, can be ascertained from a comparison of the two railways referred to in the extract where the court says (p. 54):

"The defendant's road appears to be of the class of traction company that was before the court in *United States vs. Baltimore & Ohio S. W. R. Co.*, 226 U. S., 14, and that was excepted from the decisions in *Omaha & C. B. St. R. Co. vs. Interstate Commerce Commission*, 230 U. S., 324."

By referring to these two opinions it should appear just what is the class of the railroad here referred to and what the point of distinction is. As already pointed out, the kind of road which was before the court in *United States vs. Baltimore & Ohio S. W. R. Co.*, to-wit, the Cincinnati & Columbus Traction Company, is described as "*an inter-urban electric railway for passengers and some freight, running between Norwood and Hillsboro through the middle of the diamond*" (described elsewhere as 53 miles long),

"enclosed by the steam roads and authorized to go on to Columbus." Again, it is described as "an independent venture, in its general course parallel to, *more or less competing with the steam roads* and working on a different plan." So we find that the road there referred to is a general commercial railroad engaged in the transportation of both passengers and freight between *different* cities and towns over its private right of way and competing actively with the steam roads and even actually seeking physical switching connections with them, evidently for the purpose of interchanging freight without having to break bulk.

Now reverting to the Omaha & Council Bluff Case to get a description of the character of railroad mentioned as "excepted from the decision," on page 337 we find the following:

"But is it said since 1887, when the act was passed, a new type of *interurban* railroad has been developed which, with electricity as a motive power, uses *larger cars*, and *runs through the country from town to town*, enabling the carrier to haul *passengers, freight, express, and the mail* for *long distances at high speed*. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight."

To show further that the character of line of the appellant company is practically identical with the class of railroads included in the decision in the Omaha & C. B. St. R. Case, we quote further as to the character of railroad intended to be included therein, further showing that that description coincides in all respects with the character of railroad that the appellant is authorized by its charter to operate and which in fact it does operate.

Mr. Justice Lamar says:

"At some points the line is on private property, but where this is and to how great an extent does

not appear. Indeed, the record does not show that electricity was used as a motive power, though in the light of modern methods that may possibly be assumed. But it affirmatively appears that the company was chartered as a street railroad and hauls *no* freight and is doing only *a business appropriate to a street railroad*, so that *whatever the motive power or the size or the speed of the cars is immaterial*. In any event, there were 'street cars' referred to in the act of Congress authorizing the construction of the bridge from Council Bluffs to Omaha (24 Stats. at L., 501, Chap. 356). The company used such cars and did a street passenger business only, it laid its tracks in crowded thoroughfares of those cities and *their suburbs*, and it is manifest that Congress did not intend that *these tracks* should be connected with *railroads for hauling freight cars* and long trains through and along the streets of Omaha and Council Bluffs."

It thus is plain that the mere fact that a street railway does a suburban as well as urban business, that it is operated by electricity instead of horse power, and that it operates in part over a private right of way, does not fasten upon it the character of a railroad within the meaning of these acts, for on page 335 the learned Justice, speaking for the court, continues:

"If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroad proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually *connected with other railroads*, which themselves are further connected with others, *so that freight*

may be shipped without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight "between states," "between states and territories," "between the United States and foreign countries." The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in 'every depot, station, or office where passengers or freight are received for transportation.' The railroads referred to in the act were not those having separate, distinct, and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

It is submitted that a clearer description of the business in which the appellant company is engaged could not have been indicated than is thus depicted in this opinion, if the learned Justice who wrote it had had all of the facts of this case before him. And yet the Court of Appeals, doubtless misled by the earnestness and eloquence of the learned counsel for appellee, slips into the error of saying that the appellant company was chartered "not as a street railway company but as an electric trolley suburban and interurban railway company," and that "this case is analogous to the situation disclosed in the case of *Kansas City R. Co., v. McAdow*,

240 U. S., 451, where the railway company operated an electric trolley line between *Leawantworth, Kansas, and Kansas City, Missouri*, where it connected with the lines of a street railway company over whose line its cars were run from and to the terminus of its own line," and then quotes the extract therefrom above quoted to the effect that the defendant's road appears to be of the class of the traction company that was before this court in *United States v. Baltimore & Ohio S. W. R. Co.*, and was excepted from the decision of the *Omaha & Council Bluffs R. Co. v. Interstate Commerce Commission*.

In view of the fact that this company in its charter above quoted was merely authorized to operate its line from a "passenger station" at 35th and M Street, running over certain named streets to Cabin John Creek, a suburban pleasure resort of this city, that it was only permitted to contract with "any *street railway company* in the State of Maryland or in the District of Columbia;" that it was *prohibited* from running any *steam car, locomotive or passenger or other car for steam railways over its lines or tracks*, and that the prohibitions of its charter were made to apply to any extension that might be made of its line in the State of Maryland; that the gauge of the tracks were to be the same as that of the *Washington and Georgetown Street Railway*; that it was required to *pace* its tracks on all public streets "between the rails and two feet outside thereof;" that it was required to light its tracks with electric lights at all *street crossings* and to sound a *gong or bell* at all crossings; that the fare for riding over the said road should not exceed *ten cents each way per passenger*, and that this amount was subsequently reduced to *five cents or six fares for twenty-five cents*, just as is applied to all street railroads in the District, that Section 4 of the amendatory act of August 23, 1894, refers to it and the other railway companies therein mentioned as "*the street railway companies mentioned in this act.*" That it was permitted to "acquire and hold stock in any *street railway cor-*

porations specifically named" in the act, and that it was prohibited from crossing any *steam railroad* at grade—all these facts bring it clearly within the terms of the opinion of this court in the Council Bluffs case, to wit: That it is referred to as a street railway company in its act of incorporation; that the company used *street cars* only and did a street passenger business only and laid its tracks in crowded thoroughfares of the city and its suburbs, "and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars" or other steam road equipment over its lines, but that it is a "street railroad laid in streets as an aid to street traffic and for the use of a single community, even though that community be divided by State lines or under different municipal control, and that it transports passengers from street to street, from ward to ward, from city to suburb," all of which things are strictly compatible with street car traffic and are not the character of traffic which is either within the reason which calls for the regulation of commerce or the evil sought to be remedied by the Federal Employers' Liability Law of 1908 as amended.

Again, the appellee's prayers 4, 5, 6, 7, and 8, (Rec. pp. 61-63) undertake to state not only the prerequisites for recovery but the measure of damages in event the jury find in favor of the appellee. They all assume as matters of law first, that the Federal Employers' Liability Law applies to the case; and, second, that the appellee is entitled to recover at all is entitled to recover not only for pecuniary loss accruing to the beneficiaries by reason of the death of their son, but as matter of fact as well of law to recover for physical pain and suffering as well.

All of these assumptions are erroneous, and hence the granting of each prayer was erroneous within the meaning of the Federal Employers' Liability Law, and if the testimony of Mrs. Fred G. Tarbell above quoted was sufficient to justify a finding to that effect by the jury, as intimated by this court in the Downey case, it must be remembered

that this testimony was not contradicted as in the Downey case, but was contradicted point blank by the testimony of Mr. Geo. G. Whitney, which at the least would make it a question of fact to be found affirmatively by the jury, and that, therefore, the court erred in directing the jury as a matter of law that a case was made out under the Federal Employers' Liability Law.

II

The action of the trial court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering (Assignments 4, 5, 6, 7, 11, 12, 13 and 19):

- (a) Because after all the evidence had been taken and all witnesses discharged, the court allowed the pleadings to be so amended as to introduce a new cause of action (Assignment 5):

It will be noted (1) that the first and second counts of the original declaration in this case were drawn under the District statute which only allows recovery for pecuniary losses of the next of kind, and does not permit any recovery for conscious pain and suffering undergone by the decedent.

It will be noted (2) that the production of the suit and right of action are alleged in *these* counts—which could not have been intended to assert a right to recover for conscious pain and suffering—in identical terms with those used in the third and fourth counts under which it is now contended by aid of the amendment the appellee seeks to recover for conscious pain and suffering.

The allegation of injury to decedent and resultant damages to the next of kin in all four counts is in the following language:

"That the deceased, on the day and date specified . . . was hit or struck . . . by one of said

posts or poles . . . and was thereby knocked from said car . . . thereby causing immediate and profuse hemorrhages, in direct consequence whereof the said deceased died on, to wit, the 8th day of July, 1913, within one hour after being hit and struck aforesaid and that the deceased at the time of his death was unmarried, and was, to wit, 18 years of age, and left surviving him this plaintiff, who is his mother, and Francis William Scala, his father, as his only next of kin, with whom he resided and to whose support he contributed and *who* by reason of the wrongful act . . . resulting in the death of the said deceased, has suffered and will in the future suffer great loss and damage and will be deprived of the support, maintenance, benefits and advantages which otherwise would have been given, rendered and supplied by the deceased had he lived.

"Wherefore the said plaintiff says that by reason of the premises and in accordance with the statutes in such case made and provided, the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal representative of said deceased, and accordingly the plaintiff brings this suit and claims the sum of \$10,000 damages."

In the appellee's brief filed in the Court of Appeals her very able counsel, in a vain effort to show that the third and fourth counts in the declaration were drawn with the purpose of asserting a right of recovery in the plaintiff for conscious pain and suffering of the decedent, as well as for pecuniary loss resulting to the statutory beneficiaries as the result of his death, said (p. 48) :

"It is to be noted that the word in both counts is not 'statute,' but in the plural, 'statutes'."

and argues that *this shows* that the suit was brought not only under said Act of 1908, but under both that Act and also the Amendatory Act of 1910. "The third and fourth counts,"

they say, "were framed under the Federal Employers' Liability Act, and when the defendant is a common carrier by railroad as in the case at bar the act of 1906 (valid in the District of Columbia) is superseded and there are *but two acts* (italics theirs) dealing with the subject; namely, the Act of 1908 and the amendment of 1910. Therefore, the plural use of the word 'statutes' necessarily, *ex vi terminis*, alleged that the suit was brought under the Amendatory Act of 1910 as well as the Act of 1908."

This but illustrates the desperate need of counsel and their willingness to grasp at straws, when we compare the like allegations of the first and second counts, and which confessedly are brought under the provisions of Sec. 1301 of the District of Columbia Code, and find that there the right of action is alleged in identical terms; to-wit, "in accordance with the *statutes* (plural again) in such case made and provided." In each of the four counts there is but one right of action asserted; that right of action which accrued originally to the appellee; whereas the right of action for conscious pain and suffering did not accrue originally to the appellee but *accrued originally to the decedent alone* prior to his death, under the provisions of the Act of 1908, and under that act did not survive but died with him, but by the amendment of 1910 was kept alive and permitted to survive to the personal representative.

On the same page of their brief counsel for appellee, still endeavoring to show that they intended from the beginning and even prior to their amendment of their declaration to sue for conscious pain and suffering to the decedent as well as pecuniary loss to his dependent parents, say:

"Another significant fact is, that when the declaration was twice amended in neither instance was any increase over the amount of damages originally claimed mentioned or requested. That amount included both claims. If that amount had not included both claims, it would have been proper at the time

of amendment to request the Court that there be inserted with the amendment an additional amount as compensation for the new claim thus brought in by way of amendment."

This absurd contention scarcely needs reply. The facts in this regard are that the amount of damages in such cases are laid always largely in excess of the amount even hoped to be recovered. In the present case the first two counts were drawn under the District statute for the benefit of but the next of kin for pecuniary loss alone. Each laid the damage at the maximum amount recoverable, \$10,000.00. In the third and fourth counts which were for the benefit of both parents jointly, and under the Federal statute, the damages were laid at double the amount previously claimed for the single parent. They also contend that in the third and fourth counts the allegation that the "decedent was knocked from said car violently and suddenly to the ground and his back bone or spine * * * crushed and broken * * * thereby causing immediate and profuse hemorrhages" was of itself an allegation of pain and suffering, and an assertion of a claim for compensation therefor and that the ensuing allegation that the "decedent's death occurred 'within an hour after being struck as aforesaid,' with allegations of damages to 'the person suffering injury,' " was but an "additional allegation of the pecuniary loss to the beneficiaries by reason of the wrongful death."

It is quite evident that the learned counsel copied the declaration from some form without seriously considering the necessity, purpose or meaning of the different allegations contained therein.

In order to bring this case within the Federal Employers' Liability Law of 1908 it was essential to allege not only that the decedent was employed by a railroad engaged in trade and commerce as a common carrier, but that his death resulted from negligence and in pecuniary loss to the bene-

ficiaries. That was the real purpose, necessity and meaning of all these allegations.

Of course the description of this accident conveys the idea that the decedent suffered a fatal injury, but there is not a word or line therein to indicate that it was the purpose of the plaintiff to ask recovery for conscious pain and suffering undergone by the decedent; their whole cause of action is stated to be that the beneficiary in the count now under discussion—the father alone—“has suffered and will in the future suffer great loss and damage and will be deprived of the support, maintenance, benefits and advantages which otherwise would have been given, rendered and supplied by the decedent had he lived,” evidently contemplating damage suffered by the beneficiaries alone. When the cause of action is inferred and stated it is that new cause of action which by virtue of the statute accrues primarily and originally to the personal representatives and not the old cause of action which at common law accrued originally to the decedent prior to his death and which action he had at common law but which at common law abated and died with him, but which under the statute of 1910 was permitted to *survive* to his personal representatives for the benefit, it is true, of the same beneficiaries to whose benefit the statute of 1908 had created the new right of action thereby created for the first time and vested originally in the personal representative.

This distinction between these two rights of action is sharply pointed out in the case of Michigan Central Railroad Co. vs. Vreeland, 227 U. S., 59. That was a case instituted originally by the personal representatives, not for the injury suffered by his intestate, but for the loss suffered by his widow as a consequence of the wrongful act. It was there contended for the railroad company that inasmuch as the decedent had survived his injuries for hours that there was no right of action under the Federal statute; that but a single cause of action followed the accident which accrued

to the decedent himself and which died with him; in other words, unless immediate death followed the accident the personal representative had no cause of action.

Justice Lurton, speaking for the court said (p. 66) :

"We think the act declares *two distinct and independent liabilities*, resting of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representatives? This is a question which depends upon the statute."

And again (p. 67) :

"Nothing is better settled than that, at common law, the right of action for an injury to the person is extinguished by the death of the party injured. The rule, '*Actio personalis moritur cum persona*' applies, whether the death from the injury be instantaneous or not. The act of 1908 does not provide for any *survival* of the right of action created in behalf of an injured employe. That right of action was therefore extinguished. The act has been many times so construed by the circuit courts. . . .

"At common law loss and damage may, in some cases accrue to persons dependent upon one wrongfully injured, and a right of action in some cases arises in their behalf. But this cause of action, except for loss of personal services before the death, abates at the death. . . .

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and

damages resulting to them *financially*, by reason of the wrongful death.

"*This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived.* It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damages sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.

"The statute, in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being. . . . Lord Campbell's Act. This act has been, in its distinguishing features, re-enacted in many of the States, and both in the courts of the States and of England has been construed *not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action.*"

That case arose before the amendment of 1910, which provided for a survival of the original cause of action which accrued to the deceased himself in addition to the new cause of action which the act of 1908 by reason of its own terms first created in the personal representative. It is not necessary to go out of this record for authority on this point, however, as the prayers granted at the instance of the appellee express the same idea. For instance, in the sixth prayer it is stated that :

" . . . The plaintiff . . . is entitled to have damages . . . assessed by you on account of *two claims* which are quite *distinct*, no part of either being embraced in the other; one is for a *wrong to the injured person* and is confined to *his personal loss* and suffering *before* he died, while the

other is for a wrong to the beneficiaries, his mother and father, and is confined to their pecuniary loss through his death; one begins where the other ends."

This language was of course taken by counsel for appellee from the opinion of the Supreme Court in *St. Louis, Iron Mountain & Southern R. Co. vs. Craft*, 237 U. S., 648. At page 656 Mr. Justice Van Devanter, speaking of the original act of April 22, 1908, says:

"In its first section it provides for *two distinct rights* of action based upon altogether different principles, although primarily resting upon the same wrongful act or neglect. It invests the injured employe with a right to such damages as will compensate for his personal loss and suffering—a right which arises only where his injuries are not immediately fatal. And where his injuries prove fatal, either immediately or subsequently . . . it invests his personal representative, as a trustee for designated relatives, with a right to such damages as will compensate the latter for any pecuniary loss which they sustain by the death. At first there was no provision for a survival of the right given to the injured person, and so, under the operation of the rule of common law, it would die with him.

"Of the right *given to the personal representative*, we said in the *Vreeland Case* p. 68: '*This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived.* . . . And in *American R. Co. vs. Didricksen*, 227 U. S., 145, 149, 57 L. Ed., 456, 457, 33 Sup. Ct. Rep., 224, we said, referring to the original act: '*The cause of action which was created in behalf of the injured employe did not survive his death nor pass to his personal representative. . . . The damage is limited strictly to the financial loss thus sustained.*'

"If the matter turned upon the original act alone it is plain that the recovery here could not include

damages for the decedent's pain and suffering, for only through a provision for a *survival* of his right could such damages be recovered after his death. But the original act is not alone to be considered. On April 5, 1910, prior to the decedent's injuries, the act was 'amended by adding the following section:'

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employes, but in such case there shall be only one recovery for the 'same injury.'

"No change was made in Sec. 1. . . . It continues, as before, to provide for *two distinct rights of action*; one *in the injured person* for his personal loss and suffering where the injuries are not immediately fatal, and the other *in his personal representative for the pecuniary loss* sustained by designated relatives where the injuries *immediately or ultimately result in death*. Without abrogating or curtailing either right, the new section provides in exact words that *the right given to the injured person 'shall survive'* to his personal representative 'for the benefit of the same relatives in whose behalf the other right is given.'

It can not be doubted that under this language there are *two causes of action*. Neither can it be doubted that under this declaration as originally drawn there was but a single cause of action asserted, to wit, the action for pecuniary loss and damage resulting to the parents by reason of the untimely death of their son.

The accident and death both occurred on the 8th day of July, 1913. The decedent's right of action accrued immediately on the accident. He survived the injury only an hour, but the right of action under the original sixth section given for the parents did not accrue until he thereafter died. If he had survived the accident six months *their* right

of action would not have accrued at all so long as he lived, but the decedent's right of action would have been in existence throughout the period of his life, and upon his death, instead of his right of action abating and dying—as at common law or in the absence of any provision to the contrary in this statute it would have done, under the express terms of the amended statute, (Sec. 9) *this* old action, which at common law would have died, is made to survive to the personal representative.

The first attempt to amend the declaration and to assert this cause of action was made on October 20, 1915, more than two years after the accident, more than two years after the death of the decedent, and after the period of limitations prescribed in Section 6 of the act itself had run against both causes of action thereby given.

Garrett vs. L. & N. R. Co., 235 U. S., 308, was an action, under the Employers' Liability Act of 1908, instituted by the administrator of a decedent. The declaration contained three counts. Each alleged the plaintiff to be the administrator of T. W. Lewis, deceased; that the decedent was employed as brakeman on a train moving in interstate commerce; that through the negligence of its operatives a collision occurred; that in an effort to save his life he was caught under an engine and was held there for six hours or more, suffering intense agony and pain and followed shortly by death; that he was 24 years of age, strong, vigorous, with fine business qualifications and earning capacity. The first and second counts alleged that the deceased left surviving his mother and father, and that the plaintiff as administrator sued the defendant for the benefit of his parents in the sum of \$50,000. The third count alleges the survival of not only his father and mother, but his brothers and sisters, and that the plaintiff as administrator sued the defendant in the sum of \$50,000. The trial court offered the plaintiff an opportunity to amend his declaration, excluded all evidence relating to the mental and physical suffering of the decedent and

all evidence tending to show pecuniary loss, and then peremptorily instructed the jury to return a verdict for the defendant. The United States Circuit Court of Appeals tendered a further opportunity to amend, which was rejected. The Supreme Court said:

"The questions presented are, first, whether under the Employers' Liability Act of 1908 (before amendment of April 5, 1910) the administrator of one who died of painful injuries suffered while employed in interstate commerce by a railroad engaging therein can recover damages for the benefit of the estate (third count); and, second, whether if such administrator sue for the benefit of the employe's parents, there being no surviving widow, or husband and child, it is necessary to allege facts or circumstances tending to show that as a result of the death, *they* suffered pecuniary loss (first and second counts)."

Mr. Justice McReynolds, delivering the opinion of the court, said (p. 312):

"It is now definitely settled that the act declared *two distinct and independent liabilities* resting upon the **common foundation** of a wrongful injury: (1) liability to the injured employe for which he can *alone* recover; and (2) in case of death, liability to his personal representative 'for the benefit of the surviving widow or husband and children,' and if none, then of the parents, which extends only to the *pecuniary* loss and damage resulting to them by reason of the death.

"The third count of the declaration under consideration states no cause of action. The employe's right to recover for injuries did not survive him.

"Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evi-

dence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters." (Citing a number of cases.)

"Although the same precision of statement is not required as in pleadings at law, nevertheless, it is held to be absolutely necessary that in bills of equity such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case he is called upon to answer. Every bill must contain in itself sufficient matters of fact, *per se* to maintain the plaintiff's case; and if the proof goes to matters not set up therein the court can not judicially act upon them as a ground for decision. *for the pleadings do not put them in contestation.* Harrison *vs.* Dixon, 9 Pet., 483, 9 L. Ed., 201, 208; Dan. Ch. Pl. & Pr., 368.

"The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. Common experience teaches that financial damage to a parent by no means follows as a necessary consequence upon the death of an adult son."

These criticisms are equally true of the original declaration.

The case of *Hurst vs. Detroit City Railway*, 84 Mich. 539, presents a case which parallels almost identically the questions arising in this case.

There, as in the case at bar, the action was by the personal representation of a deceased infant for the benefit of the surviving parent. The material allegations there, as here, are that the—

" . . . infant . . . in the exercise of due . . . care . . . was knocked down . . . and mortally injured, from which said injuries . . . the said Lorenzo Hurst did die, by reason of which negligence . . . and injury . . . and death an action hath accrued to the said plaintiff as the repre-

sentative of the next of kin of the said Lorenzo Hurst, and in which he claims damages from the said defendant in the sum of \$10,000."

There amendment was made by leave of court after the trial of the cause had commenced instead of three or four days prior to the trial as in the case at bar, but in that case, as here, it was held by the trial judge that the amendment did not change the character of the cause of action; it merely set out in more detail how the injury caused the death of the decedent, and did not assert any additional demand or right of action or cause of action by reason of the pain and suffering alleged. The amendment was made by inserting the words—

" . . . did languish in great pain and agony and suffering for the space of two hours thereafter and so languishing did live until afterwards, to wit, on the day and year aforesaid * * * by reason of the said injuries so inflicted as aforesaid by the negligence of the said defendant received,"

immediately before the words "did die."

In that case there was no evidence introduced by the plaintiff tending to show any pecuniary loss on the part of the parents, and no evidence was offered on the part of the defendant upon that score. The defendant's counsel requested the court to charge the jury that under the pleadings and proof the plaintiff could not recover.

The statement of the case then proceeds:

"After the argument upon such request to charge, the plaintiff asked to be permitted to amend his declaration so as to include a claim for damages under the provisions of act 113, Laws of 1885. The court refused to allow this amendment, and directed a verdict for the defendant."

An appeal was taken by the plaintiff below, and the court said:

"The court very properly refused the plaintiff's amendment to his declaration. The act referred to, which is an amendment to How. Stat., 7387, provides that 'in addition to the actions which survive by the common law the following shall also survive, that is to say, . . . actions . . . for negligent injuries to the person.'

"By the amendment the plaintiff sought to introduce into the case a right of recovery for injuries inflicted upon the plaintiff's intestate and for the recovery of which the plaintiff's intestate might have had an action if living, and which action was made to survive to the plaintiff by virtue of this statute. *This amendment would have introduced into the case a new and different cause of action than that stated in the declaration.* Under the declaration as framed, if any damages were recoverable at all it was only such damages as resulted from the loss of services by reason of the death of the child, while the claim of recovery under the proposed amendment was for the injuries inflicted and suffered up to the time of his death. . . . The claim made is one given by statute and which did not exist at common law. The proposed amendment is for the recovery of injuries and the right to which is given by the common law and which died with the party unless made to survive by this statute of 1885, *thus showing two separate and distinct causes of action.* The proof of one would not sustain the other, and the rights of damages and the measure thereof depended upon a different class and kind of proof—one measured by the pecuniary value of the services of the child, less the cost of maintenance, and the other the actual damages sustained by the child by reason of the injury."

Not only was the right of action for the physical pain and suffering of the decedent barred prior to the first amendment of the declaration, but even after that amendment had been made there was nothing in the declaration to put

the appellant upon notice that a claim would be asserted for physical pain and suffering; and the record in this case shows that the trial judge so held, because we find in the record (p. 68) that he "certifies that during the discussion of said question and after the court had stated to counsel for plaintiff 'I think you will have to amend before you can recover for pain and suffering.'"

And again the court said (p. 68), in speaking of this declaration after the first amendment: "I will frankly say that if I had been reading that declaration from the standpoint of the defendant I would not have suspected that it was the intention to recover for pain and suffering of this man in the hours he lived if he lived an hour after his injuries." And yet notwithstanding this statement of the court, and notwithstanding the further statement of counsel for appellant at the time that he had relied upon his right to stand upon the pleadings and to have notice from the pleadings and had gone to trial without the presence of the witnesses most competent to speak upon the question as to whether or not the decedent had suffered physical agony in his last moments, permitted said amendment.

(b) Which was already barred by limitation of the statute which permitted the cause of action to survive (Assignments 5 and 21):

The three opinions of the Supreme Court cited and quoted from above state clearly and distinctly that these rights of action, the one for conscious pain and suffering accruing originally to the decedent and merely surviving by virtue of the statute to the personal representative is entirely separate and distinct from the other cause of action given originally to the personal representative for the benefit of certain named relatives and which the decedent never had and never could have. It follows necessarily that they are separate and distinct and that the statute of limitations continued to operate against the cause of action which originally vested

in the decedent and survived to his personal representative until it was actually declared upon.

"An amendment which introduces a new or different cause of action and makes a new or different demand does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies, *although the two causes of action arise out of the same transaction, and, even though by the practice of the State, a plaintiff is only required in his pleading to state the facts which constitute his cause of action.*" 25 Cyc., 1308.

"It seems to be the settled rule that the amendment, in order to come within the doctrine of relation back to the commencement of the suit, must be but a varying form or expression of the claim or *cause of action sued on*, and the subject-matter of the amendment wholly within the lis pendens of the original suit. If the matter introduced by way of amendment, although it be such as might have been joined in a different count in the original complaint, introduces a *new claim, or a new cause of action, requiring a different character of evidence for its support*, and affording a different defense from that to the cause as originally presented, it will not relate back to the commencement of the suit, so as to prevent the plea of the statute of limitations to the new matter thus introduced." Nelson vs. First Nat. Bank, 139 Ala., 578, 101 A. S. R., 52, 55.

In Mohr vs. Lemle, 69 Ala., 180, it was held:

"The plaintiff may introduce a new cause of action by amendment, but such amendment can not have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for that cause of action at the time of making the

amendment When an amendment introduces a new right or new matter, not within the lis pendens, and the issue between the parties, if, at the time of its introduction, as to such new right or matter the statute of limitations had operated a bar, the defendant may insist upon the benefit of the statute, and to him it is available as if the amendment were a new and independent suit."

"According to the overwhelming weight of authority, an amendment introducing a new and distinct cause of action barred by the statute of limitations is not allowable." 31 Cyc., 413.

Certainly under these tests the amendment should not have been allowed.

In the case of *Whalen vs. Gordon*, 95 Federal, 305, the court said:

"By the legal fiction of relation, an amendment to a petition ordinarily takes effect as of the date of the commencement of the action. But this fiction always yields to the positive provisions of statute and to the legal rights of the defendant. It is never permitted to deprive the adverse party of any legal defense to the claim presented by the amendment such as that which arises by virtue of the provisions of the statute of limitations. . . . If no suit had been pending upon a given cause of action and the statute had barred it, it would be a plain disregard or repeal of that statute to allow the cause of action to be ingrafted by amendment upon an action for another cause which had been pending, and thus to revive by the fiction of relation that which was dead by law. In *German vs. Judge*, 27 Mich., 138, the Supreme Court of the State declared that 'to permit the shallow fiction of relation back to the commencement of the suit under such circumstances to nullify the act of the legislature would be discreditable to the judiciary.' In *Dudley vs. Price's Admr.*, 10 B. Mon., 84, 88, the Supreme Court of Kentucky said: 'If

during the pendency of a suit any new matter *or claim* not before asserted is set up and relied upon, the defendant has a right to insist upon the benefit of the statute until the time that the new claim is presented, because until that time there was no lis pendens as to the matter between the parties.' The rule which governs the reciprocal effect of the doctrine of relation and the statute of limitations upon each other in the matter of amendments to petitions—a rule which seems to be universally sustained by the authorities—may be stated in these words. An amendment to a petition which sets up no new cause of action or claim and makes *no new demand*, but merely varies or expands the allegations in support of *the cause of action already propounded* relates back to the commencement of the action, and the running of the statute against the claim so completed is arrested at that point. But an amendment which introduces a new or different cause of action and makes a new or different demand not already introduced or made in the pending suit does not relate back to the beginning of the action so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action and the statute continues to run until the amendment is filed. Ry. Co. *vs.* Wyler, 154 U. S., 285, 289, 298, 15 Sup. Ct., 877; Ry. Co. *vs.* Cox, 145 U. S., 593, 601, 606, 12 Sup. Ct. 905; Sicard *vs.* Davis, 6 Pet., 124; Van de Haar *vs.* Van Domseler, 56 Iowa, 671, 676, 10 N. W., 227; Jacobs *vs.* Insurance Co., 86 Iowa, 145, 53, N. W., 101; Buel *vs.* Transfer Co., 45 Mo., 563; Scovill *vs.* Glasner, 79 Mo., 449, 453; Crofford *vs.* Cathran, 2 Sneed, 492; Railroad Co. *vs.* Jones, 149 Ill., 361, 37 N. E., 247; Eysenfeldt *vs.* Steel Co., 165 Ill., 185, 46 N. E., 266; Railroad *vs.* Campbell, 170 Ill., 163, 167, 49 N. E., 311; Christy *vs.* Farlin, 49 Mich., 319, 13 N. W., 607; Flatley *vs.* Railroad Co., 9 Heisk., 230, 237; Buntin *vs.* Railway Co., 41 Fed., 744, 749; Newton *vs.* Allis, 12 Wis., 378; Railroad Co. *vs.* Smith, 81 Ala., 229, 1 South., 723.

"In the last case in which the Supreme Court has had occasion to consider this question (Railway

Co. vs. Wyler, 158 U. S., 293, 15 Sup. Ct., 877), the original petition was for negligence of the railroad company in employing and retaining a fellow servant who was known to be incompetent, by means of whose incompetency and negligence a heavy iron dump was permitted to fall upon the plaintiff. The amendment counted upon the negligence of the same fellow servant and the statute of Kansas, which charges a railroad corporation with the negligence of the fellow servant of the injured employe. The original petition counted upon the liability of the railroad company under the common law, the amendment upon the liability under the statute of Kansas. *Both causes of action were based on the same transaction and resulted from the same facts. The Supreme Court held that the amendment stated a new cause of action, and that it was barred by the statute of limitations.*

"Let a stranger wrongfully enter upon a homestead of an owner, break down the door of his house and forcibly eject him from his premises and wrongfully retain them from him. That transaction gives rise to at least three causes of action which under the statutes of Iowa have different periods of limitation—one for injuries to the person with a limitation of two years; one for injury to the property, with a limitation of five years, and one for the recovery of the real estate, with a limitation of ten years. Ought the rule to prevail in the Code States that the owner of this property may set out the facts of this transaction and demand a recovery of his real property when his action in this case is pending for nine years and until the statute on his causes of action for injury to the person and to the property and without reviving them by ingrafting them upon his petition in ejectment by amendment in defiance of the statute of limitations because they arose out of the same transaction as his cause of action to recover the land? It is as vital to the interests of society in the States which have adopted the Code system of pleading as it is in the other States that these statutes of repose shall not be evaded or annulled.

and this result can only be avoided by the application to the effect of amendments to pleadings of the general rule we have announced. It seems to us to have been adopted in all the States of the Union and we think it should be steadily and uniformly maintained and applied in the federal courts. . . .

"An extended review of the authorities seems unnecessary because this court is bound by the decision of the Supreme Court of the United States and its opinion in *Railway Co. vs. Wyler* appears to end debate. In that case the cause of action in the original petition arose out of the same transaction as that stated in the amendment—out of the fact that a fellow-servant negligently allowed a heavy iron dump to fall upon the plaintiff. The action was brought in a Code State where forms of action were abolished. The only difference in the statement of the two causes of action was that in the one the plaintiff counted on the known incompetency of the fellow-servant through whose carelessness he was injured and the common law, and in the other on the negligence of the same fellow-servant and the statute of Kansas, which charges railroad companies with the negligence of such servants. The case was tried in the United States Circuit Court which necessarily took judicial notice of the common law and the statute of Kansas. The truth is that both causes of action not only arose out of the same transaction but under the same laws and *out of the same facts*. The only real difference was that in the one the plaintiff claimed to recover under the common law and in the other under the statute of Kansas. But the Supreme Court held that this was a *departure from law to law* and that the cause of action stated in the amendment was a new cause of action and was barred by the statute. In delivering the opinion of the court Mr. Justice White said, relative to the solution of the question whether or not the amended petition stated a new course of action:

"The legal principles by which this question must be solved are those which apply to the law of departure, since the rules which govern this subject

afford the true criterion by which to determine the question whether there is a new cause of action in case of an amendment. In many of the States which have adopted the Code system great latitude has been allowed in regard to amendment, but even in those States it is held that the question of what constitutes a departure in an amended pleading is nevertheless to be determined by the rules of the common law which thus furnish the test for ascertaining whether a given amendment presents a new cause of action, although it be permissible to advance such a new cause of action by way of amendment.'

"At the conclusion of the discussion he applied the general rule we have announced to the effect of an amendment under the Code system upon the statute of limitation of a State which had adopted that system. He said:

"The general rule is that an amendment relates back to the filing of the original petition so that the running of the statute of limitations against the amendment is arrested thereby. But this rule from its very reason applies to an amendment which does not create a new cause of action. The principle is, that as the running of the statute is interrupted by the suit and summons so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged by way of amendment which are part thereof. But where the cause of action relied upon is in an amendment yet different from that originally asserted, the reason of the rule ceases to exist and hence the rule no longer exists."

The cases cited and quoted in this case appear to be directly in point and conclusive of the point now under discussion.

"Common law liabilities and statutory remedies for the same wrong are generally deemed separate and distinct ground for action, not to be substituted one for the other by amendment; nor can one stat-

utory remedy be converted into another." 1st Enc. Pl. & Pr., 569, 570.

In *Schulze vs. Fox*, 53 Maryland, 37, the court said:

"The only exception taken by the appellant, the defendant below, was to the refusal of the court to allow him to file the plea of limitations to the second, third and fourth counts of the amended declaration. The action was for slander and was instituted on the 30th day of September, 1878. The original declaration contained two counts charging the defendant with speaking of the plaintiff words which imputed the crime of larceny. . . . The defendant pleaded not guilty and the trial was begun on the 17th day of April, 1879. . . . Immediately upon the filing of this amended declaration the defendant asked leave to file a plea of limitations to all the counts of it except the first, but this leave was refused.

"It is very clear these counts make an entirely new case. They charge the speaking of words which, under the statements of the colloquium, impute to the plaintiff the statutory offense of embezzlement and not the common law crime of larceny. The amendment was a material one, for without it the words set out in these counts could not have been given in evidence and no case could have been made out by them against the defendant. The occasion for the amendment was brought about through no fault on his part. No continuance was allowed, and as soon as it was filed the defendant was compelled to plead at once to the amended and new declaration. We are all clearly of opinion that under the circumstances he *had the right* to interpose the plea of limitation as a defense to the new case thus made against him. It is true that according to the current of decisions in Maryland the plea of limitations is not a plea to the merits, can not be entered short on the docket, is never permitted to be amended, and can not be filed after the rule day. Still it is a defense which the statute of the law of the State has wisely provided, and cases have arisen in which the defendant's right to in-

terpose this plea even after the rule day has been sustained. Thus, under the state of facts that existed in *Newcomer vs. Keedy*, 9 Gill, 263, it was held the plea should have been received."

Counsel for appellee in their brief in the Court of Appeals (p. 52) only claimed that the original declaration "sufficiently '*pointed*' to a claim for conscious pain and suffering, and therefore the trial justice did not err in permitting the amendment."

If the allegations of the third and fourth counts to the effect that the decedent's injuries caused his immediate death "within an hour," which resulted in loss and damage to the statutory beneficiaries "sufficiently '*pointed*' " to a claim for conscious pain and suffering, we would inquire: Why did they use identical language in the first and second counts which confessedly *did not intend* to assert and the *Statutes* (sic) under which they were framed would not permit to be asserted a claim for conscious pain and suffering? The answer is plain: It is evident that the present claim of appellee in this respect is an afterthought.

Appellee in the Court of Appeals relied on *Seaboard Air Line v. Renn*, 241 U. S., 290, and quoted widely separated extracts therefrom as if they were closely related, but omitted the following among other statements necessary to a proper understanding of the extracts quoted and interwoven between them, and entirely in point here (pp. 239-4) :

"But if it, (the amendment) introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested."

The *Renn* Case was merely a case of a *good* cause of action defectively asserted. The court below permitted an amendment which "merely extended or amplified what was *first* alleged in support of *that* cause of action" and which did not assert "a new or different cause of action."

No one disputes that that can be done, but such a case has

no application to the case at bar, where plaintiff had two causes of action founded in part, it is true, on the same facts, but which "causes of action," as distinguished from the "*cause*" of the injuries were originally separate and distinct. These causes of action accrued at different times to different plaintiffs, for different beneficiaries or owners, and for different wrongs or injuries, though it is also true that both causes of action (assuming the statute applies and the facts justify) through death finally became vested in the same trustee for the same beneficiaries. One of these causes of action accrued at once on the occurrence of the accident to young Scala, prior to his death, and for his sole benefit. Compensation to *him* for *his* pain and suffering alone was the extent and the measure of the damage recoverable under that right of action. Upon his death this action did not "*accrue*" to but survived to his administratrix for certain beneficiaries. The other cause of action was separate and distinct from it; it never accrued to the decedent. If he had survived the injury and died from other causes, even the next day, it would never have accrued to him or to any one else. It only accrued on his death from those injuries, to his representative for the benefit of certain beneficiaries. The extent and measure of the damage recoverable under that right of action had no relation whatever to that recoverable under the first, but was the pecuniary loss resulting to the *beneficiaries* from his death and entirely independent of any question of the decedent's pain or anguish, thus coming squarely within the distinction stated in *Hurst v. Detroit City Ry.*, *supra* (84 Mich., 539):

"The proof of one would not sustain the other and the right of damages and the measure thereof depended upon a different class and kind of proof—one measured by the pecuniary value of the services of the child, less the cost of maintenance, and the other the actual damages sustained by the child by reason of the injury."

The same comment is applicable to *Illinois Surety Co. v. Peeler*, 240 U. S., 214, also relied on by appellee.

Missouri, K. & T. R. Co. v. Wulf, 225 U. S., 570, was also relied on by appellee as in effect overruling *Union Pacific Railway Co. v. Wyler*, *supra*. An examination of that case does not justify this claim. It grew out of a suit instituted originally by Sallie C. Wulf in her individual capacity, alleging that she was the mother, sole heir, next of kin and distributee of her only son, Fred S. Wulf, who "while in the employ of defendant as a locomotive fireman and in the performance of his duties as such upon a train bound from Parsons, in the State of Kansas, to Osage, in the State of Oklahoma," was killed by the negligence of his employer. These allegations of fact stated a complete case, showing an exclusive liability on the defendant company under the Federal Employers' Liability law. But through error the pleading, without referring to that law, erroneously alleged the liability as accruing under the Kansas statute, in which State the injury occurred and the laws of which would have governed the rights of the parties in the absence of the Federal Statute. In order under this mistaken view of the law to show jurisdiction in the Federal court it also alleged diverse citizenship. Subsequent by leave of the court the same plaintiff was permitted to amend by showing that she had duly qualified as a party plaintiff in that capacity also. The allegation of the application of the Kansas statute was the result of mistake apparent upon the face of the record, and being a mere erroneous conclusion of law, was treated as surplusage by the court. The allegation of diverse citizenship of course did not deprive the court of the jurisdiction it already had under the other allegations. Dealing with this point, the court said (p. 576):

"But the court was presumed to be cognizant of the enactment of the Employers' Liability act and to know that with respect to the responsibility of interstate carriers by railroad to their employees injured

in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S., 1. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleadings than a reference to any other repealed statute would have done."

Then taking up the only real question in the case, that is, the failure to institute the suit originally in the name of the administratrix, the court continued (p. 576):

"It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American R. Co. v. Birch*, 224 U. S., 547. But in that case there was no offer to amend by joining or substituting the personal representative; and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us—an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the *capacity* in which the plaintiff was to prosecute the action. The amendment was clearly within Sec. 954, Rev. Stat. U. S. Comp Stat 1901, p. 696.

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Sec. 6 of the employers' liability act. The change was in form rather than in substance (*Stewart v. Baltimore & O. R. Co.*, 168 U. S., 445). It introduced no new or different *cause of action*, nor did it set up any different *state of facts* as the ground of action, and therefore it related back to the beginning of the suit. *Texas & P. R. Co. v. Cox*, 145 U. S., 593, 603; *Atlantic & Pacific R. Co. v. Laird*, 164 U. S., 393, 395.

See also McDonald v. Nebraska, 41 C. C. A., 278, 101 Fed., 171, 177, 178; Patillo v. Allen-West Commission Co., 65 C. C. C., 508, 131 Fed., 680; Reardon v. Balaklala Consol. Copper Co., 193 Fed., 189." (Italics ours.)

Then referring to Union Pacific R. Co. v. Wyler, instead of overruling it, this case shows wherein that case was distinguished from the case then under discussion, and shows that by the amendment in the Wyler Case, unlike the case at bar, it did set up "not only a different state of facts, but a different rule of law."

In this case the amendment not only alleged *additional* facts, but facts which were *essential to show* the accrual of a *cause* of action different from that originally asserted, which accrued at a different time, to a different person for a different injury, governed by a different measure of damage to such other person, and dependent on such different facts. "There are," as was said by Mr. Justice Lurton in the Vreeland Case, *supra*, "*two distinct and independent liabilities* resting upon a common foundation of a wrongful injury, but based upon *altogether different principles*." This cause of action is independent of any cause which the decedent had and includes no damages which *he* might have recovered for his injury if he survived."

It is clear, we think, from these expressions that these two causes of action come within the language and principles illustrated by the Wyler Case, and not within those followed in the Wulf case.

It is also apparent, we think, that the Court of Appeals misconstrued the language of this court in the Vreeland Case and the Craft Case when it said:

"We have, therefore, a single right of action for a double wrong. The two claims, though *distinct*, originate in the injury which is the basis of the right of action to recover damages on one or both claims."

There is a confusion of thought and terminology here. There can, of course, be a single recovery for a double wrong, as was said by this Court in the Craft Case, *supra*, where the word "wrong" relates to the injuries sued for, but it is hard to conceive of a single *right of action* so accruing from even one wrong when the consequences of the wrong are inflicted on and suffered by different persons and the rights of action therefor accrue at different times to different parties and the damages resulting are measured differently. Strictly speaking, the *wrong* which is the foundation of this, as of every other cause of action *ex delicto*, is the alleged wrongful act of the defendant. If there was no such wrong there can be no cause of action. If there was this *single* wrong there might be as many different causes of action as there are persons proximately injured thereby. It is evident that in a collision between two street cars, for instance, which may be the result of but a single wrong, or a single negligent act, yet if fifty people are proximately injured fifty rights of action may accrue; and in case of a married woman or infant child, two or more causes of action may accrue from only one physical injury to a single person. These are not a single cause of action, however, and even if a statute permitted or required all persons or their personal representatives to recover for such injuries in one action, it would not have the effect of making a dozen essentially different *causes of action* accruing at different times to different persons, and measured differently, a *single* cause of action.

That is just the case under this statute. It gives different rights of action to different persons injured thereby: (a) To a man, who is physically injured, a cause of action which accrued immediately on such injury. He may live a day or one hour or six months. An action for all damages accruing to *him* in his life accrued to him and *him only*, and in event of his death before its recovery, under this statute it survives to his personal representative. (b) Should he die of his in-

jury, whether at once or six months thereafter, another separate and distinct cause of action then for the first time accrues, not to him or for his benefit, but to his personal representative, for the pecuniary injuries resulting to his dependent next of kin, and not for *his* injuries, but for *their* injuries resulting from his death, and which in turn resulted from the original one wrongful act of negligence.

That there has been no confusion of thought on the part of this court on the question of these two rights constituting special rights of action is shown by the reiteration by Mr. Justice McReynolds in *Great Northern Railway Co. v. Capital Trust Co.*, U. S. Adv. Op. 1916, pp. 41, 42, of the following extract already quoted from the *Craft Case*:

"We are careful however, to say" (658)

"Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

In *Buntin vs. Chicago R. I. & P. R.*, 41 Fed., 744, the court said:

"While the courts in observing the spirit of the Code should be liberal in allowing amendments, yet it should be in furtherance of justice and not beget laxity in pleading by encouraging attorneys without a consideration of what they want or how to sue for it to state anything as a case on the reliance that afterwards when they find out what they want they may substitute a new cause of action and call it an amended petition."

This extract is also a sufficient response to appellee's suggestion that Sec. 399 affords some justification for the action of the trial court in allowing the amendment.

The appellee's counsel in their brief before the Court of Appeals (p. 76) also claimed that this appellant waived the right to plead the statute to the amended declaration by failure to object to the first amendment, and by consenting that the amendment might be interlined. The Court of Appeals disposed of this objection in its opinion, citing *Union Pacific Ry. vs. Wyler*, 158 U. S., 285. In addition we would cite *Atlantic Coast Line vs. Burnett*, 239 U. S., 199, 201, which holds that where a statutory right of action of this kind is given to be asserted within a given period, that a plea of the limitation is unnecessary but can be established under the general issue.

- (c) **There was no sufficient evidence before the jury to warrant a recovery therefor even if properly pleaded (Assignments 11, 13 and 19):**

The evidence on this point is exceedingly meager.

Theodore H. Hardy, Jr., who was a passenger on the car, testified (Rec., pp. 22, 23):

The motorman stopped the car as quickly as possible, and we ran back and picked him up. He was bleeding very bad; right down in his crotch; he was still living then.

Q. He was still living then, though? A. He was still living, and he said, "Oh, my God."

Q. As regards suffering, what can you say? A. He was suffering pretty bad.

Q. He was conscious? A. Well, he said, "Oh, my God." I suppose he was conscious.

This witness was not cross-examined.

John H. Burroughs, a witness introduced on behalf of the appellee, stated (Rec., p. 23) he only saw him in the ambulance being taken to the hospital at Georgetown:

Q. Was he living at that time? A. Well, he had life in him, and that was about all you can say.

Q. Did you hear anything? A. You could hear a little groan from him.

Upon being cross-examined (Rec., p. 24), he said:

Q. He was unconscious at that time, was he not, Mr. Burroughs? A. Yes, sir.

And upon further redirect-examination stated:

Q. Do you know whether he was unconscious or not, or whether he was in conscious pain when he was groaning? A. No, I could not say. For the crowd, all I could hear was this groan.

Q. You could not say whether he was conscious or unconscious? A. No, I could not say whether he was conscious or unconscious.

Q. All you heard was his groan? A. Yes.

Mrs. Emma E. Knowles, who saw him for the first time at 36th Street, testified as follows (Rec., p. 24):

"No sooner had I got on the car than I took my hand and put it on the man on the floor of the car, and someone said, 'Who is it?' I said 'It is Scala.' . . . I stayed there and rubbed the man's forehead and he opened his eyes and looked kind of rattled like and groaned." That she stayed there with him about five minutes but she went away to get some water; that there was a crowd there when she got back; that it was 15 or 20 minutes before he was taken to the hospital, which is about a square from where he then was; that he laid there on the car.

Q. What can you say with regard to his suffering any pain about that time? A. He just simply groaned. That is all I know.

This witness was not cross-examined.

Mr. Burrell Martz, another witness introduced on behalf of the appellee, says that when they found the man he was sitting down but had dropped down with his head towards his knees. (R., p. 25):

Q. What condition was he in? A. *He never said nothing. He never made a noise or anything.*

Q. Was he moaning or groaning at the time? A. *I could not hear a noise.*

Q. You could see he was not dead, couldn't you? You could observe that he was not dead? A. Yes; I didn't know that, but there were several gentlemen had hold of him.

Witness denied that he had stated to counsel for appellee very recently that "he observed he was not dead but was moaning and groaning," but that witness had said, "He sounded like he was moaning."

Q. He made some sound of that kind? A. Yes, sir; a little noise.

Q. And he was not dead? A. No, sir; I don't think he was quite dead. There was life in him (Rec., p. 24).

Mr. Joseph Perry, another witness called on behalf of the appellee, testified (Rec., p. 25) that after the accident they went back and found the man. Decedent was pretty well rolled up in the dirt, and he had nothing to say. He made a moan or so, and that is about all I heard of it.

Q. You heard him moaning? A. Yes, sir.

Dr. William F. O'Donnell, medical witness introduced on behalf of the appellee, and who examined him at the hospital, testified as follows:

Q. How long after the man arrived at the hospital did he die? A. As far as I know, I judge it was about two or three minutes after I saw him. He stopped breathing about two or three minutes after I saw him.

Q. How long had he been at the hospital before you saw him? A. I should say maybe three or four minutes.

Q. He was alive when he was brought to the hospital? A. Apparently so; yes, sir.

Upon cross-examination he was asked (Rec., p. 28):

Q. Was the man conscious or unconscious during the time you saw him, Doctor? A. I am not in a position to say. I confined my efforts with Dr. McCormick to the lesion low down.

Q. Don't you know that he was unconscious, Doctor? A. Apparently so; yes, sir.

B. Peyton Whalen, witness introduced on behalf of the plaintiff and who was the first man to him and who went to the hospital with him, testified as follows (Rec., p. 29):

Q. How about his suffering and condition coming down on the car? A. He was not conscious. He did not appear to be conscious at all. He was groaning when I got back to him; but whether he had ceased groaning before I got to the hospital I will not say positively.

Q. He was groaning? A. He was groaning at the time when I got back to him, when he was lying on the ground.

And upon cross-examination (Rec., p. 30) :

Q. He was unconscious from the time you first saw him? A. Yes, sir. He did not speak a word. That he was groaning but did not seem to be conscious.

Mr. Justice Van Devanter in *St. Louis & Iron Mount. R. vs. Craft*, 237 U. S., 648, there speaking of the sufficiency of evidence of physical pain and suffering said :

"The record discloses that the decedent survived his injuries more than a half hour, and that they were such as were calculated to cause him extreme pain and suffering, *if he remained conscious*. A car passed partly over his body, breaking some of the bones, lacerating the flesh and opening the abdomen, and then held him fast under the wheels with a brake rod pressing his face to the ground. It took fifteen minutes to lift the car and release his body, and fifteen minutes more to start him to the hospital in an ambulance. It was after this that he died, the time not being more definitely stated. As to whether he was conscious and capable of suffering pain the evidence was conflicting. Some of the witnesses testified that he was 'groaning every once in a while' and that *when they were endeavoring to pull him from under the car 'he would raise his arm' and 'try to pull himself'* while others testified that they did not notice these indications of consciousness, and that he seemed to be unconscious from the beginning. The jury found that he was conscious, and both State courts accepted that solution of the dispute. Of course, the question here is not which way the evidence preponderated, but whether there was evidence from which the jury could reasonably find that while he lived he endured conscious pain and suffering as a result of his injuries. That question, we are persuaded, must be answered in the affirmative."

The case was appealed to this court from the highest appellate court of Arkansas. The latter court, in discussing the same matter, said:

"The deceased was run over in the night-time by a coal car of the defendant and was found lying face downward between the rails * * *. The car had pinned his body down between the rails and it was first necessary to raise it off his body * * *. All this required about fifteen minutes time, and fifteen minutes more elapsed before the ambulance arrived, and decedent was then sent to the hospital * * *. It is certain that he was alive when they started to the hospital * * *. All the witnesses say that he was groaning during *all the time* they were trying to remove his body from under the car and until he was carried away in the ambulance. One of the witnesses stated that when he took hold of the decedent and tried to remove him from under the car *the decedent could move his arms and also try to move his body*. His companions spoke to him but he did not answer them * * * but it must be remembered that while he was under the car and during the time they were trying to speak to him he was lying face downward, one wheel of the car resting on his body. One of his companions tried to raise him up and *he moved his arm and tried to move his body*. We think the jury were warranted in inferring from these facts that *he was conscious* and was doing all in his power to assist his companions in getting him out from under the car * * *. His sufferings were doubtless increased because he could not know how long it would be before * * * surgical relief could be provided for him * * *. He must have suffered almost indescribable agony of mind and body * * *. It is *evident* that he suffered *indescribable anguish*, and we are of opinion that the jury were warranted in finding that he *continued to suffer such anguish until he had been conveyed at least a part of the way to the hospital*. Thus it will be seen that his suffering *continued for more than thirty minutes*."

The evidence in the case at bar as to conscious pain and suffering is not nearly so strong as that stated by Mr. Justice Van Devanter or by the Arkansas Supreme Court. The only evidence on that point here is that one witness stated that he heard him say, "Oh, my God" *immediately after the accident*, which might have well been an involuntary exclamation and merely muscular, and was practically contemporaneous with the injury. Other witnesses said no such exclamations were made. All the witnesses on this point were introduced by plaintiff. Another witness claims to have seen him open his eyes when she rubbed his head. Other witnesses claim to have heard sounds described as "slight groans" a "little noise," "groaning right much." There was absolutely no evidence of any intelligent conscious movement or effort of any kind. We find, however, that Mr. Justice Van Devanter, referring to the evidence there, said, p. 68:

"But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering *as are substantially contemporaneous with death or mere incidents to it*, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here."

It is respectfully submitted that all of the evidence relied upon by the appellee as establishing conscious pain and suffering comes within the exception of "pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also are short periods of insensibility which sometimes intervene between the fatal injuries and death," and which in the language of the learned justice, "afford no basis for a separate estimation or award of damages under statutes like that which is controlling here."

(d) The declaration even as amended failed to assert sufficiently a claim for such pain and suffering (Assignments 3, 19):

It has already been pointed out that so far as the concluding portion of all four counts in the original declaration are concerned the first and second are drawn under the District statute alone, where compensation for physical pain and suffering is not allowed at all, and the third and fourth being drawn under the Federal statute which gives rise, as stated by the Supreme Court, to "two separate and distinct causes of action," are identical in that they make no allegations of damage other than the pecuniary damage suffered by the beneficiaries alone, and make no prayer for compensation for any other wrong or injury than that which under both statutes "accrued to the plaintiff as the personal representative of said deceased."

It has also been pointed out that the right of action for physical pain and suffering did not "*accrue*" to the personal representative, but "*accrued*" to the decedent himself, and the only right that the personal representative gets to assert this right of action which had already accrued to the decedent was by virtue of the amendment of 1910 which provided that this right of action which had already accrued to the decedent should *survive* to the personal representative.

It is hardly necessary to argue that there is a vast difference between a right of action which accrues originally to a plaintiff and another right of action which accrued originally to a decedent and which the statute provides shall *survive* to his personal representative.

These two rights of action accrued at different times to different persons; are governed by different measures of damage, and statutes of limitation would bar them at different times. For example, suppose the decedent in this case, instead of dying within a year after his injury, should have survived a year and then died from the result of the injury. The personal representative's right of action for the

pecuniary loss suffered by the next of kin would run for two years from the death, whereas the right of action which accrued originally to the decedent for his physical pain and suffering and other elements of damage, having already run one year prior to his death, would have had but one year additional to run after his death.

The first amendment made without objection on October 20, 1915, more than two years after either right of action had accrued, consisted merely in the insertion in the fourth count the words "and causing him to suffer intense pain and injuries" so that the clause affected, which previously read—

"and was thereby knocked from said car to the ground and his backbone or spine at or near the base thereof was thereby crushed and broken and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages in direct consequence whereof the said deceased died,"

after the amendment read—

"and was thereby knocked from said car to the ground and his backbone or spine at or near the base thereof was thereby crushed and broken and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages *and causing him to suffer intense pain and injuries*, in direct consequence whereof the said deceased died. . . ."

It in no way enlarged the *demand* made in the subsequent language of the declaration following the allegations showing pecuniary loss to the surviving parents, who it is stated—

"have suffered great loss and damage and will in the future suffer great loss and damage and will be deprived of the support, maintenance benefits and advantages which otherwise would have been given, rendered and supplied by the deceased had he lived

"Wherefore the plaintiff says that by reason of the premises and in accordance with the statutes in

such cases made and provided, the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal representative of said deceased on behalf of and for the benefit of the said parents. . . . "

It is apparent that this amendment did not enlarge what had previously been a demand for pecuniary damage resulting to the parents alone into a demand for pecuniary damage plus compensation to the deceased for physical pain and suffering undergone by him. Grammatically and logically the only effect of the amendment was to specify with more particularity how the accident suffered by the decedent had resulted in his injury and death *and consequent loss to his next of kin.*

The trial judge stated and ruled from the bench that *this* amendment did not bring the element of his physical pain and suffering into issue as an element of damage in the case, and declined to allow the prayers based thereon until the second amendment of October 29th was made, after the evidence was closed, and all witnesses discharged.

This second amendment was made in the fourth count alone, and like the first one, consisted in the insertion of the words "conscious pain and suffering and in the" after the words "resulting in the" and before the word "death," so that the clause which previously read that the decedent—

"left surviving him this plaintiff, who is his mother, and Francis William Scala, who is his father, with whom he resided and to whose support he contributed, and who by reason of the wrongful act, negligence and carelessness of the defendant aforesaid resulting in the death of the said deceased have suffered and will in the future suffer great loss and damage, and will be deprived of the support, maintenance, benefits and advantages which otherwise

would have been given, rendered and supplied by the deceased had he lived "

was made to read, that the decedent

"left surviving him this plaintiff, who is his mother, and Francis William Scala, who is his father, with whom he resided and to whose support he contributed, and who by reason of the wrongful act, negligence and carelessness of the defendant aforesaid resulting in the *conscious pain and suffering and in the death* of the said deceased have suffered and will in the future suffer great loss and damage and will be deprived of the support, maintenance, benefits and advantages which otherwise would have been given, rendered and supplied by the deceased had he lived "

again showing that even after the second amendment as before the first the whole gist of the demand is for the *pecuniary* loss and damage suffered by the surviving parents as the result of the wrongful death of the deceased, and is upon the action which accrued originally and alone to the appellee as personal representative, and that nowhere is any demand made or sued for upon the right of action which accrued originally to the deceased himself and which under the statute survived to the personal representative.

In the argument of this question in the court below reference was made to the language of Mr. Justice Van Devanter in the case of *St. Louis & Iron Mount. R. Co., vs. Craft*, 237 U. S., 648, where (p. 659) he said:

"We think this clause, as applied to cases like the present, is not intended to restrict the personal representative to one right to the exclusion of the other, or to require that he make a choice between them, but to limit him to one recovery for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action."

as tending to show that both of these claims constituted but a single cause of action.

To give this intent to this language would be to do away with all that had been said previously by Mr. Justice Van Devanter in the Craft Case in arguing the proposition that this statute gave rise to *two separate and distinct causes of action*; all that was said by Mr. Justice Lurton in the Vreeland case, and all that was said by Mr. Justice McReynolds in the Garrett case to the same effect.

But the pleading in the original record of the Craft case which has been examined shows that no such meaning could possibly have been intended by this language as no occasion existed for any such meaning to be attached to it.

In that case the decedent was killed in February, 1913. The original declaration was filed in August, 1913. This original declaration merely alleged the death of the decedent and the pecuniary loss resulting to the beneficiary—in that case the father—and laid the damages at \$20,000, and made no allegations or demand whatsoever for physical pain and suffering. On February 2, 1914, within one year after the death, an amended declaration was filed containing three counts. The first count alleged the negligent death of the decedent and facts showing pecuniary loss to the beneficiaries, and further alleged that "by the injuries inflicted said deceased suffered great mental anguish, physical pain and agonies of death for over three hours *by reason of which* plaintiff claims damages for \$30,000." The second count of this amended declaration alleged the death and the pecuniary loss of the beneficiary alone, and sued for damages therefrom to the father for \$20,000, while the third count reiterates by adoption all of the allegations of the second count and adds, "That by reason of the injuries inflicted the deceased lingered for a period of three hours and died, and during all of that time the deceased suffered mental anguish, great torture, physical pain and the agonies of death, for all of which the plaintiff prays damages for the estate of the

said deceased in the sum of \$10,000." The second and third counts were subsequently withdrawn leaving only the first asserting rights of recovery both by reason of physical injury to decedent and his subsequent death and the consequent pecuniary loss to beneficiaries, and claiming as "damages in the sum of \$30,000.00," the sum of the amounts claimed in the second and third counts, thus showing very clearly that the draftsman of that declaration had clearly in mind that he was asserting two separate and distinct causes of action which accrued originally to different plaintiffs at different times, though by reason of the death of the decedent the right of action which accrued to him originally for the physical pain and suffering had survived to the plaintiff in the same capacity in which the right of action for pecuniary damages to the beneficiary accrued to him originally.

The case of *Hurst vs. Detroit Railway*, 84 Mich., 539, above cited and quoted from in connection with proposition "a" is directly in point on this proposition also.

- (e) **The allowance of the amendment operated a surprise and the appellant's motion for a continuance should have been granted (Assignments 5, 6):**

As already pointed out, the learned justice who presided at the trial of this case frankly stated that the declaration in this case would not have put *him* on notice that a demand for compensation for conscious pain and suffering was being made. Counsel for the appellant company stated to the court that *he* had relied upon the pleading as not presenting that case, and had consented to go into the trial in the absence of the surgeons who had attended this man in his last illness and who would have been in a position to have given the most helpful testimony as to whether or not he was or could have been conscious for any appreciable time following his accident; and yet, after all the evidence was in and the witnesses discharged, the court permitted this

amendment; not upon the ground, as stated in appellee's brief, that counsel for appellant and the court were not surprised, and justifiably so, but because

"the court did not regard the right to recover for conscious pain and suffering of decedent under the Federal Employers' Liability Act and the amendment thereto as a separate cause of action." (R., p. 68.)

As was said by Mr. Justice McReynolds in *Garret vs. Louisville & Nashville R. Co.*, 235 U. S., 308:

"Where any fact is necessary to be proved, in order to sustain the plaintiff's right to recovery the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters." Citing *Bank of the United States vs. Smith*, 11 Wheat. 171, 174, 6 L. Ed., 443, 444; *Minor vs. Mechanic's Bank*, 1 Pet. 46, 7 L. Ed., 47, 56; *De Luca vs. Hughes*, 96 Fed., 923, 925, and various other cases. . . . "If the proof goes to matters not set up therein the court can not judicially act upon them as a ground for decision, for the pleadings do not put them in contestation." Citing *Harrison vs. Nixon*, 9 Pet., 483, 503, 9 L. Ed., 201, 208; *Dan. Ch. Pl. & Pr.*, 368.

(f) The appellee's demurrer to the appellant's plea of the statute of limitations should not have been sustained (Assignment 7):

The pleading of the statute of limitation raises an issue of fact and issue should have been taken thereon, and then submitted either to the jury upon proper instructions from the court, or, where there was no conflicting evidence, should have been determined by the court under a peremptory instruction.

III.

There was no evidence of negligence on the part of the appellant resulting proximately in the death of appellee's decedent. Hence the court erred in failing to direct a verdict for appellant at the conclusion of the appellee's evidence and again at the conclusion of all the evidence (Assignments 1, 2, 3, 4, 8, 14):

- (a) Because the appellee's own evidence uncontradicted showed that the decedent came in contact with the pole after he lost his footing, and that he did not lose his footing because the pole struck him:

This involves of course the proposition just considered—that the Federal Employers' Liability Law did not apply—which will not be discussed further; but in order to discuss the objection in its other lights, it will be necessary to go into a brief resume of the evidence.

But one witness was able to testify as to what struck Scala and how he happened to be struck. He was B. Peyton Whalen, sheriff of Montgomery County, Maryland, summoned as a witness by both parties and introduced originally as the star witness for the appellee. His testimony shows clearly that Scala's death was not the result of any negligent proximity of the poles to the track, but was due to the fact that in some unexplained way *he missed grasping the handle bar* and then lost his footing on the running-board and fell. He was a passenger on the car (Rec., p. 29), and was sitting on the front seat on the inside and facing to the front of the car, and his own words are as follows:

"There was nothing wrong with him. As far as I know he was perfectly sober, attending to his business.

"Q. Just tell us what occurred. A. He stepped backwards or stepped down onto the runningboard and came back along the runningboard of the car, and had his right hand ahold of the first upright

post. He apparently missed his footing and he was a little clumsy and he grabbed with his left hand around me. I was sitting there near the running-board on the front seat and *his left hand did not seem to catch the post*. Anyhow, he was off the car in an instant. It kind of threw him back. As I saw him do that I grabbed him but *owing to the distance away* I did not get any hold on him and at that time the pole struck him.

Q. You saw that? A. Yes, sir.

Q. And it drove him right into you? A. Yes, sir. I am a little bit ahead of my story. *Just at the time I grabbed him when the pole struck him*, but, as I say, he fell down and I could not get ahold of him on account of the awkward way I had to grab him, and I did not get him.

Q. Was his hold of the stanchion at the front of the car firm, or would he have fallen had it not been for the pole striking him? A. I suppose so. His hold apparently seemed to be firm. I am not able to say more than my observation of the man.

Q. Then how did this pole strike him, and where did it strike him? A. Along on the rump.

Q. And that drove him into you, and you tried—
A. (Interposing.) *Then is when I tried to grab him and when I missed him.*

Q. And then he fell? A. He fell then.

Q. From the car? A. He fell right off the running-board (Rec., pp. 29, 30).

Q. How many poles beyond McCoy's Station? A. My recollection is it was counted the next morning to be four poles.

Upon cross-examination (Rec., p. 30) the witness stated that at the time of the accident he was facing the same way the motorman was and the same way the car was going, and opposite the seat that faced towards where he was sitting, and noticed this young man leaving the motorman's platform and stepping down onto the running-board, facing backwards, and coming towards him.

Q. Before he came in contact with anything he seemed to lose his footing and slip? A. He was not in an upright position when the pole struck him, no . . . but he seemed to have trouble getting his footing. It appeared to me at the time that he seemed to have considerable trouble in getting his footing.

Q. Then what happened? A. As I say, then the pole struck him. The car was going along and the pole struck him, but I had a broken finger, or something, and I did not get hold of him.

Q. And it struck him on the rump? A. Yes, sir; it struck him on the rump.

Q. As he apparently lost his footing he sort of dropped? A. That put him off his balance, yes sir.

Q. Where did you catch him? Did you catch him by the lapel of the coat? A. I caught him by the lapel of the coat, but as I say, I did not get a good hold of him. I do not know if it would have helped him if I had *because he had been struck then*.

Q. Had he been struck before or after you grabbed him? A. *Before*.

Q. There was nothing, I suppose, to obstruct your view of the occurrence? A. *There was nothing to obstruct my view* (Rec., p. 32).

When he got to him he was lying face down upon the ground, facing towards Washington, with his feet west; that exposed his rump. His clothes were torn; the seat of his trousers was torn out (Rec., p. 32).

And upon being recalled by the appellant the following day he stated (Rec., p. 47):

What first attracted my attention was he started back, and he had a hold of this upright post and made an effort to come back on the running-board back to the back end of the car in that direction (indicating) . . . he seemed to be unable to get hold with his left hand by apparently fixing his foothold on the running-board. At that time the pole struck him. He was then away from the car a

distance, and not having the proper balance it caused the pole to strike him.

Q. What was the consequence? What followed this slipping of the foot? A. *That threw him away from the car. Yes, and he swerved quite a distance from the car. As I say, that attracted my attention, but it was such short notice that before I could do anything to help him he was on top of me from the force of the pole that drove him back in the car. It was done momentarily, so suddenly that a man could hardly tell about it.*

Q. *He slipped and went away from the car?* A. *Yes, sir.*

Q. *And apparently struck something and came back into the car?* A. *Undoubtedly so.*

Q. Was that the time you grabbed him? A. Yes, sir (Rec., p. 48).

He testified further to questions by counsel for appellee as follows:

Q. Mr. Whalen, you do not undertake to say that you are sure as to the slipping of this young man's foot or that he did slip? You are certain what caused him to leave that car after the hold he had about which you testified yesterday? A. I am afraid you do not understand me. *I said he was away from the car farther than he normally would have been.*

Q. I say you do not mean to testify this morning that this young man would have fallen from that car by reason of any slipping unless he had been struck in the rump by the pole as you testified to yesterday? A. *When he was struck he evidently was away from that car farther than he would have been ordinarily.*

Witness then stated he knew Frederick Stohlman and had talked to him about the case.

Q. Didn't you state "he could easily, when he slipped, have regained his balance had he not been struck by the pole, and I was in a position had he

needed assistance, I would have been able to render it to him?" A. I dare say I made that statement. . . . I recall I made a statement to Mr. Stohlman, and I still state here, as I saw it, I claim the fellow would probably, undoubtedly, I think, grabbed that pole if he had not been struck.

Q. It was not the slipping that caused him to fall, but the striking of that pole? A. *The slipping caused him to be farther away from the car than he ordinarily would have been* (Rec., p. 48).

Q. Mr. Whalen, could that man have been struck by that pole if he had not slipped? A. *I would say not. On the other hand, I also think if he had been standing upright, as a man ordinarily would, on both feet, he could not have been struck.*

Q. You were summoned as a witness for the plaintiff? A. Both parties called me. It is very embarrassing to me.

Again (Rec., p. 49):

Q. Mr. Whalen, you do not undertake to say if a pole is only 30 inches from the holder of a car, and the car may be rolling, that a man's rump, you call it, can not be struck by that pole without his letting go his hold of the stanchion? A. *What attracted my attention was that he was quite a distance away from the car.*

Q. You cannot say this would have struck him unless he was on the running-board and holding on with both hands? A. *Why, I would say he could not.*

(Rec., p. 49):

The witness could not say how far this pole was from the car, nor the average distance, *though in passing he had seen the poles*; that he could not state "that man could not have been struck by this pole when on that car on that occasion without leaving the car or leaving hold of the stanchion," unless this par-

ticular pole was unusually closer than the rest, and he does not know whether it was or not.

Q. You mean the average pole will not strike a man; that is what you mean, in other words? A. *That is what I mean; yes, sir.*"

No other witness actually saw the accident.

The other witnesses testifying to these points were **Mrs. Fred G. Tarbell** (Rec., p. 18), who said the car was going between 25 and 30 miles an hour; that she lived along this line sometime back; that on this occasion and just before the accident occurred the conductor had passed up and spoke to the motorman and then started back after collecting fares; then she *heard* a thud and looked back and saw him hurled off the car, and he was catching from pole to pole passing down the running board (Rec., p. 19). This corroborates Whalen, who says the blow knocked Scala to him and that he afterwards fell. This gave Mrs. Tarbell time to turn her head after hearing the thud and to see him fall. "The car was going so fast when they tried to stop it after someone hollered it threw us backwards." (Rec., p. 19.) "He was dark and had great large brown eyes. I guess he was nearly six feet tall; he looked tall." That he was a fine looking young fellow. He had both hands on, reaching from handle to handle. That she *heard* a thud and then saw him in the air, as it were, falling. She did not notice him slip or fall off the car *before he was struck*. The car turned a curve and was going so fast that something struck him and he fell right off; it was right after he turned a curve that the accident occurred, but she *could not tell how long afterwards*. "It seemed to me he was clinging closer *because the space was so narrow. He was not hanging out at all*" (Rec., p. 20). She did not see the young man after he was injured.

On cross-examination she testified as follows (Rec., p. 20):

Q. He had not been struck when you turned?

A. I watched him go down the running-board, and then just as the car turned—it was going so fast and turned—and then he was struck.

That at this time when she saw him he was passing from those poles—it was an open car, of course—passing from pole to pole, and the car gave a sudden lurch and he was struck, “and then all I saw was the body going backwards.”

Q. I understood you to say that he seemed to be standing in closer to the car than usual, instead of being farther out than usual. Was that the impression it made on your mind at the time? A. *I think they are all careful going up the road, because the passageway is so narrow at different places along the road.*

Q. And he was in closer? Instead of hanging out he was closer? A. Oh, he was not hanging out at all (Rec., p. 21).

Witness stated later, however, that she did not see Scala when he was struck:

Q. What portion of his body did you see struck?

A. *Oh, I could not see that. All that I saw was his body hurled off the car.*

Q. You did not see his body come in contact, then, with any object? A. I just saw the body going, *but it was a narrow place and the car was going so fast.*

Q. I just wanted to get that clear, that you did not see his body come in contact with any object. A. The poles are very close to the place—

Q. Yes, but I want to know if you saw his body come in contact with any object? A. *No.* (Rec., p. 21).

And on re-direct examination (Rec., p. 22), she testified:

Q. You heard—— A. I heard a thud. I know that he struck a pole, *but I did not see it.*

Q. You heard it though, did you not? A. Yes, I did. *I heard a terrible thud and the body must have struck a pole.*

Q. And you say that just before that the car had given a lurch. What do you mean by a "lurch;" a side movement? A. Swaying; yes; it was going so fast.

Q. A roll? A. Yes, sir (Rec., p. 22).

Theodore H. Hardy, Jr. (Rec., p. 22), did not see the man when he was struck. He testified:

The car was going at a pretty good rate of speed. I would say between 15 and 18 miles an hour, as fast as the cars generally go out there in the summer time; at a pretty good rate of speed. The conductor was standing directly in front of me speaking to the motorman, and he started to the rear and had gotten about four or five steps, I should judge, when *I heard a thud* as though he had struck something. The motorman stopped the car as quickly as possible, and *we ran back and picked him up.* He was bleeding very bad; right down in his crotch; he was still living then.

Q. He was still living then? A. He was still living, and he said, "Oh, my God."

Q. Was he leaning out unusually far on the car?

A. *No; he was standing close.* . . . I guess he had hold right in front of the car there. *I do not know,* you understand; I am *judging*, that is all (Rec., p. 23).

Q. What was the first thing unusual that attracted your attention? A. Why, *I heard a sort of thud* as though he had struck something. That is all. I did not expect this thing.

That *before this thud* he did not notice anything unusual in that conductor or his manner or his stand or hold . . . The witness did not notice the

pole that struck him . . . that he could not say what particular part of his body struck the pole (Rec., p. 23).

Upon cross-examination he stated:

Q. And this young man when he came down on the running-board passed out of your sight? A. When the conductor went to the rear of the car *he passed out of my sight.*

Witness never saw him thereafter until he picked him up "and that is all I know" (Rec., p. 23).

Mr. Burrell Martz (Rec., p. 25), was a passenger on the car; he "noticed the conductor *before* the accident;" the first time he noticed him he had been walking along and laughing and talking to the motorman.

Q. What next occurred? A. The next was a *large sound and I heard the jar of the car* like it had run over something hard and heavy. . . . Several of them *hollered* that the conductor was struck or off the car. He ran about a block before they missed him off there (Rec. p. 25).

Josephus Perry (Rec., p. 26), was a passenger and saw the conductor before the accident.

"When I first paid attention to him he was leaving the front end coming down the running-board. He had started down. . . . The next thing occurred *I saw him falling from the car.*

Q. Did you hear any thud? A. I saw the object just before it fell. As far as hearing anything there was no sound at all, not as I heard. *I don't know what caused him to fall off.*

On cross-examination he was asked (Rec., p. 27):

Q. Did you see Mr. Whalen make a grab for this man? A. *I saw Mr. Whalen make a grab for something, yes.*

*Q. Then what happened when Mr. Whalen made that grab? A. *He fell right off the car right down onto the ground.*

Q. When you saw Mr. Whalen make that grab was the man apparently coming in toward the car or going out from the car? A. *Coming in.*

Q. Was there anything unusual about the speed of the car? A. No, sir; nothing at all, sir.

On re-direct examination he testified (Rec., p. 27):

Q. You do not know what caused the conductor to come in toward the car? No, sir; I do not know what caused that.

Q. *He came in toward the car, toward where Mr. Whalen was?* A. *Slightly so; yes sir.*

Q. You do not know what knocked him in or drove him in that way? A. No, sir; I do not know what caused him to come in that way (Rec., p. 26).

Mrs. R. Evelyn Burge, the only other witness to the accident, introduced on behalf of the appellee, testified (Rec., p. 37), that she was sitting in the seat right back of the motorman on the front of the car; that she had noticed the conductor just after she got about a mile out of Washington; that just before the accident happened he had just gotten up and spoken to the motorman taking up fares as he went along, and then started back:

"He put out his left hand to take hold of that thing. He had hold of it, released the other hand, and about that time he was struck."

She heard a dull, sickening thud (Rec., p. 38). The conductor *fell* from the car after he was struck by the pole. . . . The car was running at a high rate of speed, "as fast, I think, as I have ever ridden." *The car was swaying horribly; that they had just gone around a curve.*

Q. You did not see him slip or fall off the car before he was struck? A. *No, sir.*

Q. And the first thing you saw or heard was what? A. *The sound of him being struck.* We saw the contact.

Upon cross-examination this witness stated (Rec., p. 38), that *she did not see Scala come in contact with any pole; that she heard it, and had her back to him.* "I had just stopped looking at him just about the time he was struck." "Just about the time I turned my head he was struck" (Rec., p. 38). "I would not say that the lurch of the car threw him off," but denied that she had said that the lurch of the car threw the conductor off and that is what hurt him. And when shown a document and asked: "I would ask you if that is your signature?" replied: "Yes; that is my signature. I gave that statement right after the accident, didn't I?"

Q. In that statement you said the conductor was standing on the front end of the running-board and moved back to the end of the first seat when the car lurched and threw him off. Didn't you say that? A. If it is there I said it, but I remember the next day we were discussing about this horrible thud, you know, about him striking, and the car was rocking from one side of the car track to the other.

Mr. O'Donoghue: Was that a typewritten statement you were just asking her about, Mr. Barbour?

Mr. Barbour: Yes.

The Witness: That was my signature.

Mr. Barbour: Who did the typewriting on that statement?

The Witness: *I did, I suppose.* Was the statement sent to me or did someone come for it?

Mr. Barbour: That statement was just put through the mails and mailed back by you to the company.

Mr. Barbour: Did Mr. Moran talk with you about this matter at No. 2129 18th St. on July 9th? A. That was my residence.

Q. Didn't you say this in answer to a question asked by him: "Where were you at the time of the accident? A. I was sitting on the front seat back of the motorman.

"Q. And what did you see of the accident? A. Well, the conductor had been up front talking to the motorman and then he left to go to the rear of the car and *as he turned and was going back, of course, I lost view of him, and at that moment the car made a curve, and gave a violent lurch, and that, I have no doubt, is what caused him to fall.*"

Q. Didn't you say that at the time? A. I don't know. I don't suppose he ever mentioned the fact that he was struck. That is the only reason why I did not say I thought he was struck.

Q. But did you not make the response to that question as I have just read it to you? A. Probably.

Q. Didn't he say: "Did you see him when he fell?" To which you responded: "No." Is that right? A. Yes, sir. *I did not see him.* He just passed out *of my sight at the time of the accident.*

Q. Did he not then ask you: "Did you see him catch for the handle and miss it?" to which you responded, "No, I do not know whether he did that or not." A. He passed us and reached back . . . and by that time, of course, I did not pay any more attention to him, as he was then out of my sight.

Q. But did you not make the response I have just read to you "No, I do not know whether he did that or not?" A. I could not tell you whether he missed it or not. He had caught hold of it the last I saw of him.

Q. Did he not then ask you, "How fast was the car moving?" A. Yes.

Q. And you said, "I thought a good speed, and then this awful lurch came." A. Yes.

Q. And did he not ask you "Where was he then?" and you said "I just lost sight of him going back." Is that correct? Did you not say that? A. Yes.

Q. Was that correct? A. Yes, sir.

Q. And that is correct now, is it? A. Yes, sir; except that I am positive the conductor was hit—this boy was hit.

Q. You think he was hit? A. I am *almost* positive he was.

Mr. O'Donoghue: She says she heard it.

Mr. Barbour: Did you see him hit? A. I heard this awful thud. We discussed it the next day, and then I had not thought about it until now up to this time (R., p. 40).

It thus appears from this testimony, introduced on behalf of the appellee, and wholly uncontradicted, that the decedent was not struck on the head by a pole as stated in the declaration, but was struck on the rump, and in an effort to regain his balance his body was extended farther out than it would ordinarily be extended; that he struck the pole because he had already lost his footing, not by reason of the dangerous proximity of the pole, and that instead of the pole being located within seventeen inches or less from the stanchion on the car as alleged in the appellee's declaration, there was a clearance of thirty-three inches from the nearest pole (Rec., p. 36).

It also appears from this evidence that the trolley pole with which he came in contact was as close up against a solid rock embankment and as far from the track as it was possible to be placed at that point.

Herbert S. Gormley, a civil engineer in the employ of the appellant, who had made measurements in regard to this pole just after this accident, and who was introduced as a witness on behalf of appellee, testified (Rec., p. 35) that the first pole west of McCoy's Station is 4' 8" from the rail and the inside edge of the pole; the next pole is 4' 6"; the next is the fourth pole, above the platform counting the one at the platform, and is 4' 8", and the next one is 3' 11".

Q. That is the fourth pole from McCoy Station?
A. Yes, *not counting the one at the station.*

Q. That is counting the one at the station? A. *Not counting the one at the station.*

That all these measurements were made from the rail and the south side of the pole (Rec., p. 36).

Upon cross-examination (Rec., p. 36) he said:

Q. Now, you have testified that from the gauge line here, the inside of the rail, to the pole out here, which is not shown on this drawing, after the fourth pole was 3' 11"? A. Yes, sir.

Q. That is 47 inches? A. Yes, sir.

Q. You have testified that the clear from a perpendicular from the gauge line to this stanchion here is 17 inches? A. Yes, sir.

Q. That is, then, from the outside of that stanchion to the pole would be 47 minus 17, would it not, leaving 30 inches clear? A. *Yes, sir.*

Q. These measurements that you refer to, where were they taken; at the level of the ground or the level of the rail, or at some other place? A. They were taken *at the level of the rail.*

The poles all had a rake of three-fourth inches or more to the post from the track, so that at four feet the pole would be thirty-three inches from the stanchion.

Q. Now can you state as to whether or not there was more clearance as the pole arose? A. Yes; because the poles at that point have a rake; in other words, they lean away from the track, the minimum distance is at the level of the rail, and it increases as you go up.

Mr. O'Donoghue: Does this particular pole lean away from the track, pole No. 187? Is it not straight? A. I have it marked three-fourths of an inch rake—three-fourths of an inch to the foot.

Q. It is practically straight? A. That short distance, yes.

Mr. Barbour: In a rise of four feet that would make a difference of three inches, would it not? A. Just about; yes, sir.

Q. That is the measurement of the fourth pole?

A. Yes, sir (R., p. 37).

Philip F. Gormley, a witness called on behalf of the appellee, testified (R., p. 40), that he had on the day of the trial measured the poles at McCoy Station, and testified that Pole No. 181 is at McCoy's Station, and is 4' 6" from the inside edge of the rail to the nearest point to the pole; that is, from the south side of the north rail to the south side of the pole No. 181; pole No. 183 is 4' 6"; the other pole next to No. 183 that he did not find any number of was 4' 6½"; pole No. 187 is 3' 11". All of these poles are on the north side of the track. Pole No. 189 is 4' 6¼"; pole No. 191 is 4'; pole No. 181 is 6' 6"; opposite No. 183, on the south side of the track, is 6' 6½"; opposite No. 187 it is 6' 6"; opposite No. 189 it is 6' 6"; and opposite No. 191 it is 6' 5".

Q. Where these few poles are that you have given that are three or four feet away is right around what; around where there is an embankment? A. Between pole No. 187 and No. 189 is some rock embankment, in behind poles No. 187 and No. 189.

(The photographs introduced in evidence in this case and which it was stipulated should be a part of the record in the Court of Appeals without being reproduced, showed this pole No. 187 in close contact to a stone embankment. Mr. Gormley said "right up to the embankment.")

Q. *But these poles could not be in any farther without the embankment being removed, could they?*

A. No (Rec., p. 41).

Upon cross-examination witness stated that he made these measurements from the level of the inside north rail.

Q. You said there were some poles there even four feet. What poles were they? A. No. 189 and No. 191.

Q. There is a rock formation all through there, is there not, Mr. Gormley? A. Yes, sir; it practically is between No. 187 and No. 189.

The testimony introduced on behalf of the appellant corroborates largely the uncontradicted statements of Mr. Whalen, as the following brief outline of it will indicate:

J. J. Thomas (Rec., p. 42) testified that he is an inspector for the Washington Railway and Electric Company, and was acting in that capacity in June, 1912; that he knew Alvin Joseph Scala, and had weighed and measured him prior to his examination and employment in June, 1912, and a record was made of that which showed that his height was 5' 8" and his weight 140 pounds, and identified the written application previously identified by his father, Francis William Scala, marked "Defendant's Exhibit No. 2," and read therefrom the date of the birth of the decedent as March 6, 1891, and that he was 21 years of age on his last birthday (Rec., p. 43). That he signed a second application in which he made the same statement, and that the second paper was signed by his father (Rec., p. 43).

Jerry Hegarty (Rec., p. 43), testified that he was Depot Clerk for the Washington Railway and Electric Company and that he keeps a record of the runs made by the different conductors and motormen and which he had with him in court, and from which had made a compilation of the number of hours made by the decedent (Rec., p. 43) as conductor on the Cabin John Bridge division of the appellant company's line, which compilation he produced and showed that conductor Scala made from July 23, 1912, to July 8, 1913, 94 round trips on the Cabin John Bridge line on all of which trips he passed the point of the accident twice; that the line over which he passed was double-track line and on the return trips he would pass on the opposite

track; on the trip out he would go on one track and on the trip in he would go on the other track; that 22 of these trips were made in the year 1912; they started in July, 1912, right in the middle of the Glen Echo season, and at that time he worked extra list and did not go out there every day. He varied from day to day.

"I haven't the exact record of the days here, but he went up there every day. Take August 30th, he made 2 trips up there; August 31, he made two trips up there on that day. September 1, he went up there two trips. September 2, 3 trips. September 5, two trips. September 7, one trip. All the trips made in 1912 were in the months of July, August and September. Then the park was closed and he was not on that run any more that year. In 1913 he took a regular run, No. 40, and went there every day, starting the first day of June, until the day he was killed; his per diem varied a little every day; on June 1st he made 9 hours, 8 minutes, and drew \$1.96; June 2nd he made 9 hours, 29 minutes, and his pay was \$2.04."

Upon cross-examination he stated:

"He got his regular run on the first day of June and worked ten straight days without a day off; he was off the 11th of June and was off again the 16th of June. He worked the 17th, was off on the 18th from that time until he died, but did not have any full day of 24 hours off from that time until he died" (Rec., p. 44).

Harry Vogel (Rec., p. 44), who was a passenger on the car, and who was sitting directly behind the motorman, stated:

"Just as the conductor was leaving the motorman, after talking to him, at the time he got back about the second or third seat and was going on the rear of

the car for a fare it seemed as though he slipped or so. When I looked at him I just seen his body in the air. Of course some one hollered, and there was an awful noise right after his body fell as though the motorman did something to the car and made this noise overhead."

Q. Did anything strike him before he slipped? A. *I didn't hear nothing. I didn't notice nothing.*

He also says the car was not going more than they generally go, about 15 or 20 miles a hour; that his body was between 10 and 15 feet from the nearest pole that he noticed there. This pole was 15 or 20 feet beyond him. When asked:

Q. You did not see this man fall off the car, did you? A. I seen him leaving the car. His body was going off the car.

Q. Was that the first you saw of him? A. After leaving the motorman he started back, and when his body was going off the car that is when I seen him.

Q. Did you hear any sound? A. *Nothing at all until after he went off the car.*

Q. You said it seemed as though he slipped. Could you see his feet? A. *No, sir.*

Q. Then how can you say whether he slipped or not? A. He seemed to be reaching from one bar to another one at the time.

Q. Do you call that slipping? A. *He lost his handhold, I guess. (Rec., p. 45).*

Q. Did you see this man lose his handhold? Did you see this man lose his hand from the handle bar? A. *No, sir.*

Q. Why did you just say he loosed his hand? A. Because he was reaching from one bar to another at the time (Rec., p. 45).

William F. Holmes, (Rec., p. 46) was a passenger, and recalling the accident, said there was no one between him and the running-board, and he saw the conductor when

he fell from the car or was thrown from the car. . . . There was no unusual movement of the car noticeable. He saw him fall and saw nothing after that until the overhead blew out. "After he *fell* from the car someone, a lady, if I am not mistaken, hollered that the conductor had *fallen* off the car." (Rec., p. 47.)

The motorman, **William Emmet Wiser**, stated that the number of the car involved in the accident was "1625;" that the conductor had been up there just about half a minute before.

"He just came up and said to me; he says, 'You do not run the car as fast as Mack,' who was his regular motorman, a man named McNamee. He was his regular motorman." This was the first run the witness had had with him at that time. "After he left I received one bell; that meant to stop at the next stop, and about half a second, or a few seconds later a lady raised up in her seat back of me and hollered that the conductor had *fallen* off the car. . . . I reversed my car and stopped. . . . I blew my overhead and stopped. The car was going at that time 12 or 15 miles an hour."

He saw Scala's body; it was lying about 12 feet east of the pole. It was in "a little cut like" and there was a gully along in there.

Herbert S. Gormley, recalled on behalf of the appellant, stated that the measurements to which he had previously testified were made the morning after the accident; had made none since; they were correct "to the best of my knowledge" (Rec., p. 50). Witness identified a photograph marked "Defendant's Exhibit Y" made that day, and also the original from which the enlargement was made (Rec., p. 51), and he identified the pole that was very prominent in that picture from marks on the pole such as knot holes and knots, and in a photograph made October 18, 1915, which shows pole No. 187 prominently he identified

the pole so marked as the same pole shown in the enlarged photograph "Exhibit Y" (the number 187 was not on this pole at the date of the accident, but was put thereon shortly after the accident, and the second photograph was taken more than two years after the accident).

"But this pole has a slight rake and leans out of the perpendicular and away from the track." That none of these poles have been changed since this accident. "I won't say about the same distance (from the track), because they are working on the track and *they are bound to vary a little bit*, but the poles are the same and the distances are practically the same" (Rec., p. 54).

L. LeGrande Johnston, another Civil Engineer in the employ of the appellant company, testified that to his knowledge there had been no change in the location of these poles or tracks during the ten years that he had been connected with the company, and that if material changes had been made he would have known of it (Rec., p. 56).

It is respectfully but earnestly submitted that the motion to direct a verdict should have been granted, because there is absolutely no evidence showing negligent construction on the part of the appellant railway company. It is well known that both in the city and in the country there are numerous places where obstructions in the way of trees and poles are within less than forty-seven inches of the rails of street-car companies.

(b) **Because the line of poles was not negligently placed dangerously near the tracks as alleged in the declaration:**

Counsel for appellee in their brief filed in the Court of Appeals for the first time laid stress on the point that it was uncontradicted in the testimony that pole No. 187 was

located on a slight curve; that other adjacent poles were located at greater or safer distances, and concludes:

"Therefore, because of this curve, the danger of the negligent closeness of that pole was concealed; that this particular pole was practically plumb or perpendicular, while adjoining poles had a considerable lean away from the track which was not as apparent."

And the Court of Appeals in its opinion seems to give some consideration to these alleged facts.

It is submitted that these contentions, even if true, and were points in issue under the pleading, could have no material effect on this case. But it is insisted that all of these points are mere afterthoughts and were never in issue in any way, and that the "negligent closeness" of any particular pole was never alleged in the declaration nor was the plumbness of the pole or its location at a curve as constituting negligence relied on in any of the pleadings in this case, and it is too late now to attempt to bolster it up by flimsy pretexts. As a matter of fact, the poles did have a rake or inclination from the track, variously testified to by witnesses who knew, at from three-fourth inches to one inch per foot, and the measurements testified to in the record of distances are measurements at the height of the rail.

The Court of Appeals in its opinion (R., p. 76), in speaking of the distance of pole No. 187, says it was in closer proximity to the tracks than any other pole in that vicinity; that it stood but three feet, eleven inches from the inside of the near rail and but nineteen and three-eighths inches from the outer edge of the runningboard of the car, losing sight of the fact that the runningboard itself was more than nine inches wide, and that at a height of four feet from the rail there was at least clear space between the outside of the car and this pole of thirty-three inches.

In response to the suggestion that the fact that this pole was in a cut and near a curve would prevent any one from noticing it, it is manifest on the contrary that the presence of this pole in a cut and in close contact with a solid rock embankment, as was the case here, would the more surely impress its presence on the mind of any observant person.

This case was not founded upon the allegation that a *particular pole* was negligently out of alignment with other poles, but all four counts of the original declaration in this regard are identical and allege the construction in substantially the following terms; that—

“overhead wires are supported by cross wires attached to upright posts or poles placed or planted in the ground on the outside of each track.”

The breach is alleged that the appellant company—

“did negligently, carelessly and in a dangerous manner plant or place said upright *posts or poles* along the outer tracks of said line *too near* to the cars and to the running-board of the summer cars running over said tracks and lines aforesaid, leaving only a distance of, to-wit, *seventeen inches* between said *posts or poles* and the stanchions or holders affixed to the uprights at the end of each seat on said summer cars.”

The evidence also shows uncontradictedly that the decedent had ample opportunity to observe the condition and emplacement of these poles, having passed there, as shown by the evidence, at least 144 times within the five or six weeks preceding his death, and nearly 200 times within the twelve months preceding his death. The location of these poles had not been changed within ten years. No former accident had ever occurred there. There was no allegation in the declaration that this *particular pole* was out of alignment as compared with other poles on the same line, and

therefore this feature of the case was not gone into. *Garrett vs. Ry. Co.*, 235 U. S., 308. It is not improper to say here that if it had been gone into ample evidence could have been produced to show that there are hundreds of poles on this as well as on the other lines of the appellant company located much closer to the tracks than the particular pole figuring in this accident is shown to have been located.

It is manifest that a clearance of thirty-three inches between the outside line of a car and the inside line of a post is more than ample distance for any conductor exercising anything *like reasonable care for his own safety* in what is and must be known to be a dangerous occupation, to pass without coming in contact with the pole, especially when we recall that the side of the car is not solid but is all open, affording every opportunity to expose but a small portion of the body.

Even if it was dangerous it was a risk incident to the employment which in entering the employment and continuing in it after opportunity to observe obvious conditions, was assumed by the decedent.

Mr. Justice Holmes, while a member of the Supreme Court of Massachusetts, speaking for an unanimous court in the case of *Ryan vs. Railroad Company*, 47 N. E., 877, where a brakeman was injured in descending from the top of a freight car by being struck by a picket fence on the top of a wall only 3' 9½" from the nearest rail, though he had *no actual knowledge of its existence*, said:

"The fence . . . was a permanent, visible structure, and . . . did not constitute one of those *unusual* dangers to which an employe, who has not taken the risk of them with actual notice of their existence, has a right to assume that he will not be exposed to by entering an employment. It was not near enough to the track for that. It was 3 feet and 9½ inches from the nearest rail. In *Lovejoy vs. Railroad Co.*, 125 Mass., 79, the obstruction was

a little nearer the track, and the plaintiff had no actual knowledge of it. If opportunity to observe the danger be material, the plaintiff had had chance enough to do so. *Bell vs. Railroad Co.*, 168 Mass. 443, 47 N. E., 118, and cases cited."

(c) **It is not negligence for an electric railway to maintain permanent and visible structures in close proximity to its tracks.**

The Supreme Court of Iowa, in *Gould vs. Railway Co.*, 66 Iowa, 590, said:

"It is not true that a railroad company is to be regarded as negligent in erecting or maintaining contrivances or things in the operation of their roads for the reason that they are *dangerous* to persons operating the trains. Indeed, the whole business of operating trains is dangerous; it is full of peril to those employed. When there is danger it does not follow that the companies are negligent as to the thing from which the danger springs."

The test is whether or not the thing, even though dangerous, is reasonably safe to one exercising *ordinary care*, and that is what was expressed in the same opinion where the court said:

"The instruction should have expressed the thought that if the crane was dangerous to persons operating trains in the exercise of ordinary care the defendant was negligent in constructing it."

The Supreme Court of Indiana gives expression to the same thought in *N. Y. C. & St. L. R. vs. Ostman*, 45 N. E., 652. Deceased was killed by coming in contact with a cattle chute 38 inches north of the center of the north rail on one side, and 35 inches north of the center of the north rail on the other side, and the distance from the side of his cab to

the side of the chute where his head came in contact with it was only 13 inches. The court said:

"The deceased did not know nor have any opportunity of knowing that any part of the chute was within 13 inches. The defendant knew that the condition was hazardous. It would seem that the correct standard of measurements is that it must be when erected or maintained dangerous or unsafe to persons operating its trains when they are exercising under the particular circumstances *ordinary care*."

It can not be doubted that a conductor exercising ordinary care could keep out of the way of a trolley pole 47" or 50" from the rail as the case may be, and 30" distant from the outside line of his car.

The recent case of *Reese vs. Phila. & Read. Ry. Co.*, 239 U. S., 463, decided after the case at bar was tried, presented the question which we are now discussing. The deceased was a capable and experienced fireman "and acquainted with the general conditions described," which consisted of a yard in which were "two parallel tracks running north and south." . . . The distance between such north and south bound tracks was stated by the court to be "much less than the general standard adopted by the company," and "box cars moving thereon have barely enough room to pass. These conditions are *obvious and have existed for fifteen years or more*."

The evidence showed that "about midnight . . . while his engine was moving five miles per hour along one of the parallel tracks he attempted to procure drinking water at a tap in the side near the bottom and three feet from the front of the tender; that in doing so his body was extended outside the line of both tender and engine and crushed by contact with a freight car standing on the other parallel track."

The court says:

"At the conclusion of the plaintiff's testimony the trial court, finding 'no evidence of negligence or neglect to provide him (the employe) with a safe place to work as to the act he was performing at the time,' entered a nonsuit and afterwards refused to take it off. This was affirmed by the Circuit Court of Appeals (225 Fed., 518), upon the ground that the railroad 'did not fail in its duty to provide the deceased with a reasonably safe place to work;' and the sole question for our consideration is whether any other conclusion could be legitimately drawn from the facts disclosed."

Mr. Justice McReynolds, in delivering the opinion of the court, affirming the judgment, stated:

"The rule is well settled that a railroad company is not to be held as *guarantying or warranting absolute safety* to its employes under all circumstances. . . . A railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another . . . and certainly the mere existence of such conditions is not enough to support an inference of negligence where, as here, it is necessary to utilize a public street."

(d) Because whatever dangers resulted from the proximity of the poles to the track was inherent and obvious; the decedent had ample opportunity to observe and appreciate the danger, and therefore assumed the risks resulting therefrom.

But it is not necessary for the exigencies of this case that the danger of a conductor coming in contact with a trolley pole 30" or 40" or 50" from the rail shall be held an ordinary risk of the employment which he assumes whether he had actual knowledge of the danger or not. The con-

dition, whatever it was, was obvious, and whether it was an ordinary risk or an extraordinary risk, if it was obvious he must be taken to have assumed the risk when he entered the employment.

It is undenied that the deceased had been in the employ of the company for a period of about a year preceding his accident. He had been over this particular line 188 trips, 144 of which were taken in the thirty days preceding his death. It is uncontradicted that the location of these poles had not been changed for more than ten years preceding his accident. It is undisputed that there was no fixed standard of distance for these poles to be planted from the outside rails. In the immediate vicinity of this accident it appears that poles were at varying distances, ranging from 6' to 3' 11", and it appears that this particular pole, No. 187, was *as far from the track as it was possible to place it*. While there may be some slight conflict of authority on the subject, the great weight of authority is to the effect that the risk of an obvious danger is always assumed by an employe who remains in the employ, whether he actually knows of it or not.

"The means which a person has of knowing that under the circumstances he will expose himself to peril are taken in law to be evidence of knowledge of that fact." *Gould vs. Railway Co.*, 66 Iowa, 590.

"An employe who knows or by the exercise of ordinary intelligence could know of any defects or imperfections in the thing about which he is employed and continues in the service without objection and without promise of change, is presumed to have assumed all the consequences resulting from such defects and waive all right to recovery for such injuries caused thereby." *Power Co. vs. Murphy*, 115 Ind., 566; 18 N. E., 30; *Brown vs. Railway Co.*, 69 Iowa, 61.

"A brakeman assumes the risk when descending from the top of a freight car of being struck by a picket fence on the top of a wall 3' 9" from the nearest rail, though he has no actual knowledge of its existence." *Ryan vs. Railway Co. (Mass.)*, 47 N. E., 877.

"The fence was a permanent and visible structure . . . and did not constitute one of those unusual dangers to which an employe who has not taken the risk thereof with actual knowledge of their existence has the right to assume he will not be exposed to by entering the employment. It was not near enough to the track for that. It was 3' 9½" from the nearest rail." *Idem*. Holmes, J., delivered the opinion of the court.

This same principle has only recently been recognized by this court in *Jacobs vs. Southern Ry. Co.*, 241 U. S., 229, 232, where a conductor was injured by a cinder pile claimed to have been negligently near the track. He testified that he knew of the presence of the cinders, "but I didn't know it was dangerous." Mr. Justice McKenna, speaking for this court, said (p. 236):

"He admitted a knowledge of the 'material conditions' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who admitted he mounted an engine with a vessel of water in his hand holding 'not over a gallon,' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them. We think his situation brought him within the rule of the cases. *Gila Valley, G. & N. R. Co. vs. Hall*, 232 U. S., 94, 102."

The case of *Baugham vs. N. Y. P & N. R. Co.*, 241 U. S., 237, is to the same effect. Richard T. Baugham, a lad between eighteen and twenty years of age,

"was engaged by the railroad company to act as a brakeman in its yard at Norfolk. On the second day of his employment and while mounting a freight car which was being transferred from the wharf of the company to a barge moored at the wharf, he was killed by being crushed between that car and other cars which were upon the barge."

Mr. Justice McKenna, speaking for the court, said:

"The tracks on the barge and the operation of the cars can easily be visualized. There were four tracks, two center ones and two outside ones, the former converging as they approached until they came so close together that any one caught between cars moving upon them would be crushed. The deceased, while ascending a moving car, was caught between it and a car standing on the barge and fatally injured. The inquiry is—What knowledge had the deceased of this situation, and what was the effect of that knowledge upon the liability, if any, of the company?"

"Plaintiff makes two contentions: (1) That the company failed to warn deceased of the danger to which he was exposed, and that such failure was negligence on the part of the company. (2) That the convergence of the tracks on the barge was a defect or insufficiency due to the negligence of the company in its track, roadbed, barge, and equipment.

"The railroad opposes plaintiff's contentions and insists that the deceased assumed the risk of the danger which resulted in his injury and death."

This was evidently based upon the theory that the danger was an open and obvious one. At the conclusion of the evidence a demurrer to the evidence tendered on behalf of the defendant company—which is equivalent to a motion to direct a verdict under our practice—was sustained, and judgment entered for the defendant by the lower court, to

which the Court of Appeals of Virginia refused a writ of error. This action was affirmed by this court "without discussion," the court adding:

"It is further contended 'that, as a matter of law, the common-law assumption of risk is not a defense in bar of an action under the Act of Congress.' The contention is untenable. *Jacobs vs. Southern R. Co.*, 241 U. S., 229, ante."

In *Ladd vs. Brockton St. Ry.*, 62 N. E., 730, a conductor was struck while standing on the running-board of a moving car by a trolley post. He was sent out on this part of the road to learn the condition of this portion, and had made but two trips before the accident and paid no attention to the trolley posts; in stepping down on the running-board in the performance of his duties he did not look to see if there were obstructions. The tracks had been in the same position for several years. The court said:

"The situation of the *posts and tracks* was manifest, or so far as appears was not unusual. The plaintiff was familiar with the duties of a conductor. The defendant owed him no duty of warning or instruction in regard to dangers that were *obvious* and it owed him no duty to change the arrangement of the tracks and posts upon entering the employment of the defendant. The plaintiff must be held to have contracted with reference to those as they were." Citing *Lemoine vs. Aldrich*, 177 Mass., 89, 58 N. E., 178.

"If," as was stated by the Massachusetts Supreme Court in *Bell vs. Railroad Company*, 168 Mass., 443, 47 N. E., 118, "opportunity to observe the danger be material the plaintiff had chance enough to do so."

In the case of *McLeod vs. N. Y. C. & H. R. R. Co.*, 191 Mass., 389, 77 N. E., 715, 114 A. S. R., 628, the Massachusetts Supreme Court went a bow shot beyond the position

that it is necessary to assume in this case and held that one seeking employment as a brakeman on a railroad assumes the risks of injury from buildings and other permanent structures *unusually* near the track, the risk of danger from which is obvious whether as a matter of fact the plaintiff knew of the danger or not.

The court there said :

"There was evidence from one of the plaintiff's witness that the intestate had been warned of the danger of this particular building, but the plaintiff put in a contradictory statement made by the witness. The case, therefore, is not a case where on the undisputed facts the intestate assumed the risk because he knew of it.

"But, in our opinion, the risk was one which the plaintiff's intestate assumed by entering on the employment in question. There are a number of cases in this commonwealth where it has been held that a railroad employe takes the risk of permanent structures near the track, at least when they are not unusually near, leaving open the question whether the risk is assumed if the structure is unusually near. In some of the opinions the statement might be thought to go farther, but with the exception of *Scanlon vs. Boston &c R.*, 147 Mass., 484, 9 A. S. R., 773, 18 N. E., we do not think that it does.

"The question so left open is now before us for decision, and we are of opinion that the qualification is not material, and that *the employe assumes the risk even if the structure in question is unusually near the track.*

"When the defendant invited the plaintiff's intestate to work for it, the invitation given was an invitation to work on its railroad as constructed. In inviting him to work for it the defendant did not come under an obligation to rebuild its tracks and buildings and make them more safe; but the plaintiff's intestate undertook to work on the defendant's railroad *as then constructed*, and so took the risk of all obvious dangers, including the danger of the

proximity of a building to the defendant's tracks, although it was unusually near to them.

"As pointed out by the defendant's counsel, no similar limitation has been laid down in the employment of a workman in other occupations." (Citing a large number of cases.)

"For these reasons the case of Scanlon vs Boston &c. R. Co., can not in our opinion be upheld.

"If by the terms of the written agreement this common law exemption for liability is limited so as to allow the plaintiff an opportunity to make an inspection (which we do not decide) the result is the same. The plaintiff had had an ample opportunity on the preceding Monday and on the day in question, on which he had passed the building in question six times; and the plaintiff admitted that his intestate had been warned about dangerous places in the yard but not about this place in particular."

If an opportunity to observe a dangerous condition on only two different days, on one of which he passed the building in question but six times, was sufficient to enable him to be charged with notice of all obvious dangers, how much more conclusive is the case at bar where for a period of one year at intervals this decedent had been going past these poles and during the month preceding his accident had passed it 144 times?

In *Tuttle vs. Grand Haven & Mil. Ry.*, 122 U. S., 189, the doctrine of assumed risk is discussed.

The court says:

"Judge Cooley announces the rule in the following terms: 'The rule is now well settled that in general when a servant in the execution of the master's business receives an injury which befalls him from one of the risks incident to the business he can not hold the master responsible but must bear the consequence himself. The reason most generally assigned for this rule is that the servant when he engages in the employment does so in view of all the

hazards that he and his employer when making their negotiations fixing the terms and agreeing upon the compensation that shall be paid to him must have contemplated these as having an important bearing upon their stipulations. As the servant then knows that he will be exposed to the incidental risk he must be supposed to have contracted that as between himself and the master he would run the risk.'

"The author proceeds to say that this rule is also a rule of public policy inasmuch as an opposite doctrine would not only subject employes to unreasonable and often ruinous responsibilities thereby embarrassing all branches of business, but would be an encouragement to the servant to omit that *diligence and caution which he is in duty bound to exercise on behalf of his master and to protect him against the misconduct and negligence of others in the same service*; and in exercising such diligence and caution he would have a better security against injury to himself than any recourse to the master for damages could afford.

In *Bengston vs. Chicago & St. P. & R.*, 47 Minn., 486, in discussing the doctrine of assumed risks the court said:

"While it is the duty of the master towards his servant to use proper care to conduct his business in a safe manner, yet, if his mode of doing the business is such as to subject the servant to risk of injury, the latter by continuing in the employment with knowledge of the danger, takes upon himself the risk." Citing a number of cases.

In *Thain vs. Old Colony R. Co.*, 161 Mass., 353, which has already been quoted from *supra* in connection with the risks ordinarily incident to the employment, the court has this to say in regard to obvious risks:

"He (the plaintiff) was an experienced engineer, and knew this road *as it was*. He had passed the post in question daily for a week. There were other

structures as near or nearer to the tracks. The permanent iron posts under the bridge where he was hurt were within less than four feet of one of the tracks. Outward trains on the other side of the plaintiff's train came nearer to it than the post.

There was nothing hidden about the danger which made it a trap as it was held with some hesitation that the jury might find to be the case in *Farren vs. Old Colony R.*, 143 Mass., 197, 200, where the plaintiff was pushing a car between the track and a building which stood obliquely and gradually approached it."

The Supreme Court of Texas in *Railway Co. vs. Somers*, 71 Texas, 700, says:

"If, however, in attempting to remedy its defective condition he was struck by a cattle guard so constructed as to be dangerous to employees operating trains upon the line and was ignorant of the fact that the cattle guards upon the road were dangerously near the track he would be entitled to recover. But can he be said *not to have known* of the position of the cattle guards? It does not appear that at the time of the accident he was a new hand upon the road, and the evidence shows that at the time of the accident the guards were all *about* the same distance from the tracks, and according to the theory of the plaintiff's case in dangerous proximity to it. Is it to be held under these circumstances that *he did not know the conditions of the road with respect to the cattle guards* and did not take the risks incident to that condition? Suppose it had been shown that he knew every cattle guard upon the road but the one in question, and knew them all to be near the track but did not know of this; would it be claimed that he did not in going upon the road with this knowledge assume the hazards of this faulty construction and that he could recover from an injury inflicted by the one he had not observed? This, it seems, would be unreasonable, and yet such is practically the case before us. The employees are not called upon to in-

spect the machinery, roadbed or cattle guards. It is a duty of the company to have all these inspected and to know that they are all reasonably safe, and an employe has the right to rely upon its discharge of that duty; but when he is aware that a large number of cattle guards are dangerous and in this regard they are all substantially alike so far as his knowledge extends, he must know better than to rely upon the safety of any of them and must be held to have taken the risks incident to their general condition. The case is very similar to that of *Lovejoy vs. Railroad Co.*, 125 Mass., 79, in which it was held the employe could not recover. See also *Brossman vs. Railroad Co.*, 113 Pa. St., 490; 6 Atlantic, 226."

Not only did the court refuse to direct a verdict in accordance with the law as laid down in these authorities, but went in the teeth of it in granting the plaintiff's prayer 5, by instructing the jury that—

" . . . Risks of this sort, arising out of any negligence of the defendant, the jury would not be justified in finding were assumed by the deceased, unless they find first that any negligence of the defendant in placing *that particular pole the distance it was from the running-board, and also the risk of danger therefrom to a person passing while on that running-board under the circumstances of this case were both alike known to the deceased, or were both so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*"

In *Myers vs. Railroad Company*, 95 Fed., 406, 37 C. C. A., 137, where a brakeman was struck and killed by a low bridge, it was held he could not recover as the plaintiff had actual knowledge of the height of the bridge "having ridden under them daily for at least fifty days before the accident occurred," thus showing that opportunity for knowledge was held as conclusive evidence of actual knowledge.

The court said :

"The accident which occurred in the present case was probably attributable to momentary thoughtlessness on the part of the deceased and was due to a risk of the employment which deceased must in any event be held to have voluntarily assumed."

Where it was shown that a brakeman who was knocked from the top of a freight car by a bridge had been employed on the same portion of the road for several years and knew the height of the bridges but remained in the service without protest, it was held that he thereby waived the negligence of the company in that regard. In *Wells vs. B. C. R. & N. R.*, 36 Iowa, 520, the court said :

"The evidence tends to show that the plaintiff's intestate, who at the time was a brakeman in defendant's employ, was killed by being knocked from the top of a freight car where he was in the discharge of his duty, by the timbers of a bridge over which his train was passing. It is shown that the bridge timbers were a little over five feet above the top of the car, while deceased was a man of more than six feet in height. . . . The intestate had been employed as a brakeman for more than four years upon that part of the defendant's road whereon was the bridge at which the accident occurred, and other bridges of like construction and height, and of course had often passed over them."

In *Carbine vs. B. & R. R. Co.*, 61 Vt., 348, it was said :

"By the acceptance of the service and the continuance therein the servant assumes the hazards incident to *obvious and known dangers*."

The case of *Brossman vs. Lehigh Valley R.*, 113 Pa. St.,

490, citing *Pittsburgh & C. R. vs. Sentmyer*, 11 Norris, 280, says:

"When a railroad voluntarily subjects its employees to dangers which it ought to provide against and an accident happens to an employee from a want of proper provision against such danger, the company is undoubtedly liable. But on the other hand, it is not liable for accidents happening from the ordinary risk and dangers of the business, *for it is a legal presumption that the servant assumed the risk of such accident when he entered the service of the company*. Again, we may further extend this rule by saying that the servant or employee assumes the risks of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care."

"A party by remaining in employment where he is exposed to *danger* will be presumed to *assent to the risks* and hazards to which he is thereby exposed." *Baylor vs. Del. L. & W. R.*, 47 N. J. L., 23; *B. & O. vs. Stricker*, 51 Md., 47; *Owen vs. Railroad Co.*, 1 Lansing, 108.

"If a servant accepts service with the knowledge of the *position of structures* from which he has cause to be apprehensive of injury, he can not require the master to make changes so as to obviate the danger or hold him liable for damages in case of injury." *Fleming vs. St. P. & D. R.*, 6 N. W., Rep., 448; *Gibson vs. Erie R. Co.*, 63 N. Y., 449; *Hayden vs. Welch*, 52 Ill., 183.

The rule is well stated in Wharton on Negligence section 214, where he says:

"An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from *causes open and obvious*, the dangerous character of which causes he had *opportunity* to ascertain."

"When a man chooses to accept the employment *or continue in it* with the knowledge of the danger he must abide the consequences so far as any claim against the employer is concerned." *Wooley vs. R. R. Co., L. R., 2 Exch. Div., 389.*

The case of *Pikesville & E. R., Co., vs. State of Maryland*, 88 Md., 563, 42 Atlantic, 214, and which will probably be relied upon by the appellee, is wholly exceptional in its controlling circumstances. The pole which there struck the deceased was but 2 feet 1 inch from the track, while other poles were located from 2 feet 5 inches to 2 feet 9 inches from the track, and the foot-board projected 15 inches beyond the rail, leaving a clearance of but 10 inches.

The court says:

"No instructions had been given him as to the side from which fares were to be collected, and he was killed *the day he entered defendant's employment.*"

The court there held that while the risk of employment arising from the proximity of the poles which were *properly* located were assumed by the deceased, he did not assume the risk from the dangerous, improper and *exceptional* location of the pole by which he was struck, of which location he had *no knowledge and could not have informed himself* by the exercise of reasonable care. An altogether exceptional case, and one in no way in conflict with the principles here contended for. That this opinion of the court was based on this exceptional feature may be gathered from what has already been said as to lack of both knowledge and opportunity of knowledge on the part of the conductor and the following extracts from the opinion:

"The foot-board projects 15" beyond the rail. The pole which struck the deceased was No. 300, located 2' 1" from the track. The distance of other poles from the track as measured was No. 301, 2' 8";

No. 302, 2' 7"; No. 303, 2' 9"; No. 299, 2' 4½"; No. 298, 2' 8". From the place of the accident the road is straight each way for 350 feet, and *there are no obstructions, natural or other, to prevent pole No. 300 from being placed further from the tracks and in line with the other poles.*"

The pole in question in the instant case was as far as possible from the rail.

The court further says:

"There was evidence tending to show that poles such as these are usually placed in line, and that the poles along this road apparently were so placed, and the average distance was about 2' 8" from the track. One of the poles, No. 300, was seven inches closer, and for the increased risk consequent therefrom the deceased was not bound to look out for, unless *he knew of the location of the pole or ought reasonably to have known it, or unless it was obvious.*"

As already pointed out, this was the first day this man was in the employment, and as stated by the court, *he had had no opportunity to observe this condition.* The court also thinks that poles 2 feet 8 inches from the track were reasonably safe. Could it be doubted that if it had appeared in evidence that the poles in that case were 3 feet 9 inches to 6 feet distant from the track that the court would have held that they were not reasonably safe?

On the question of the right of the court to take judicial notice of obvious general conditions the case of *Phalman vs. Detroit, etc., Ry. Co.*, 122 Mich., 232, is in point.

The court said:

"It is a well-known fact of which we must take judicial notice that it is usual for sidings to be so constructed as to permit cars to stand close to buildings. . . . This is uniformly true of elevators and coal bins, and every person of common intelli-

gence may reasonably be presumed to know that the siding is made for such purpose. . . . It being common practice upon railroads to thus locate structures it can not be negligence, for the test of negligence for a railroad company is what is usual in railroading.

"When he engages in railroading, he may be presumed to understand the nature of the work he is entering upon, and if he is not acquainted with the particular dangers of the line upon which he is to work it is his duty to give attention to them. He must be on the lookout for buildings near the tracks, and to know of the presence, usual nature of the uses of side tracks, and such dangers as naturally follow. The master has a right to expect ordinary caution and need not point out dangers that will be seen and known but for inattention and thoughtlessness. It can not be expected that he will give employers a list of structures and their respective distances from trains or tracks, or that he will send the newly employed servant over the line and sidings with a rule to measure them. He may assume that the structures will be seen and that when there is doubt about the exact distance from the track the risk will be avoided." See *Wilson vs. Lake Shore Railroad*, 145 Mich., 509; *Carr vs. Grand Trunk Ry.*, 152 Mich., 138; *Perigo vs. Railway Co.*, 52 Iowa, 276.

"The location and arrangement of a permanent structure such as a cattle chute necessary for the proper operation of a railroad is within the discretion of the officers of the railroad company, and this discretion is to be exercised in view of the conformation of the service, the character of the business to be accomplished, and the convenience of the service, and employes by whom it is to be carried on; it is part and parcel of the work of construction and is governed by the same principles." *Boyd vs. Harris*, 176 Pa. St., 484.

"The plaintiff was perfectly familiar with the situation. He knew from the daily experience of

five months that there was nothing to spare between the running-board of the common cars and the trestle" and was held to have assumed the risk, *Rock vs. Retsoff Mining Co.*, 40 N. Y. S. Rep., 556.

"If the danger from an open car be a self-evident proposition and matter of every day observation to those *not* engaged in the business as argued by appellees, surely it must have been an obvious one to the conductor of nine years experience on tracks where cars pass each other every few minutes." *Fletcher vs. Phila. Trac. Co.*, 190 Pa. St., 117.

In the case at bar one of the appellee's own witnesses, a lady passenger (Mrs. Fred G. Tarbell), testified (Rec., p 19) that *she had observed herself the dangers arising from these poles*, and that they were at different distances at *different points along the road*. She testified (Rec., p. 21) :

A. I think they are all careful going up the road, because the passageway is so narrow at *different places along the road*.

In *Gibson vs. Erie Railway Co.*, 63 N. Y., 449, 20 Am. Rep., 552, the court said:

"When the deceased entered the employment of the defendant he assumed the usual risks and perils of the service, and also the risks and perils incident to the use of the machinery and property of the defendant as it then was, so far as such risks were apparent. Accepting service with a knowledge of the character and position of the structures from which the employe might be liable to receive injury, he could not call upon the defendant to make alterations to secure greater safety, or in the case of injury from risks which were apparent, he could not call upon his employer for indemnity. Lord Chief

Cockburn, in *Clarke vs. Holmes*, 7 H. & N., 937, says:

"No doubt, when a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective from its construction or from want of proper repair, and with knowledge of the facts enters on the service, the master can not be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment." See, also, *Austin vs. Boston & Maine R. Co.* (Mass.), 41 N. E., 288.

In the case of *Drake vs. Auburn City Railway Co.*, (N. Y.), 66 N. E., 121, the plaintiff's intestate was a conductor on a street railway and was killed by coming in contact with a tree near the track. He had been over the road about 160 times as conductor and about 50 trips as motorman. He was familiar with the situation. It was held that by continuing in the employment with the knowledge of the facts deceased took the risk, and it was *error to submit the question of defendant's negligence to the jury*.

The court said:

"It is often a close question to determine whether a single obstruction located too near the track of a railroad, causing the death of an employe on a passing train, is or is not an obvious risk that he assumed. In the case before us no such difficulty is presented. The intestate, when passing over this road frequently, was fully advised as to the proximity of the trees, and if, in his opinion, there was peril in operating an open car, it was his duty to have retired from the employment. As he failed to do this, it must be held that he assumed whatever risk there was in the situation."

The Supreme Court of West Virginia, in *Stewart vs. Ohio River Co.*, 20 S. E., 922, says:

"When a servant enters into the employment of a master he assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise; that the test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may help to determine the ordinary care required in the case; that the mere fact of injury received raises no presumption of negligence on the part of the master; that when a servant wilfully encounters dangers which are known to him the master is not responsible for an injury occasioned thereby; that a servant having knowledge of danger about him must *use diligence and care in protecting himself from harm*. In the case of *Engine Works vs. Randall*, 100 Ind., 293, the Supreme Court of that State holds that 'where both master and servant have equal knowledge of the danger of the service required and the means of avoiding it, and the servant while engaged in the performance of the work he is told to do is injured by reason of his own inattention and negligence, the master is not liable.' In the case of *Naylor vs. Railway Co.*, 53 Wis., 661, 11 N. W., 24, it was held that 'if a servant knowing the hazards of his employment as the business is conducted is injured while engaged therein, he can not maintain an action against the master for such injury merely on the ground that there was a safer mode for conducting the business, the adoption of which would have prevented the injury.'"

The Supreme Court of Minnesota in *Fleming vs. St. Paul & Duluth R. Co.*, 6 N. W., 448, says:

"While it is the duty of a railway company to its servants to provide suitable instrumentalities for the operation of its road, it is competent for the servant to *assume the risks of unsuitable and inadequate instrumentalities*. If the servant enters upon and con-

tinues in the service of such company with knowledge of the unsuitableness and inadequacy of the instrumentalities furnished for the operation of the road, it is his own negligence and disregard of safety, and *he assumes the risk of the service as he finds it*. It is not against public policy, for while public policy is concerned for the safety of human life and limb, it will not offer a premium for negligence or carelessness by relieving a servant who voluntarily and with open eyes undertakes a service under the circumstances mentioned from the consequences of his own folly by charging them upon his employer. One of the most effectual ways to discourage such negligence and folly and thereby to prevent injurious consequences both to the servant and to others upon the train, whether fellow-servants or passengers, is to throw the whole risk in such cases upon the servant himself. The power of an employe to assume the known risks of the employment and the consequent exemption of the master from liability is well settled in law."

Authorities to this same effect might be multiplied indefinitely, but enough have been cited to show unmistakably that at common law a servant assumes not only the risks ordinarily incident to the service, but risks arising from all obvious dangers of the business as he knows it to be conducted, and of which he has had reasonable opportunity to acquaint himself.

That the general doctrine of assumed risks so far as it affects this case is not affected by the Federal Employers' Liability Law is amply shown by this extract from the U. S. Supreme Court in the case of *Seaboard Air Line vs. Horton*, 233 U. S., 492.

"It seems to us that sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking

secs. 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk."

Again, in the case of *Southern Ry. vs. Crockett*, 234 U. S., 725, at page 730 the court, speaking through Mr. Justice Pitney, says:

"We of course sustain the contention that by the employers' liability act the defense of assumption of risk remains as at common law, saving in the cases mentioned in sec. 4, that is to say: 'Any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'"

See also *Jacobs vs. Southern Ry.*, 241 U. S., 229.

The position here contended for is not contrary to the decisions in the United States Supreme Court in *Gila Valley R. vs. Hall*, 232 U. S., 93, *Seaboard Air Line vs. Horton*, 233 U. S., 492, and similar cases, which at first blush may not seem to be in strict accordance with it. A slight examination of these cases will show, however, that the court was in each of them dealing with defects in *appliances or machinery which were not obvious*, knowledge of which could only be imputed by a duty to inspect, and the court in these cases holds that the employees have the right to rely upon the discharge by the employer of this duty to inspect.

This distinction is brought out sharply in the case of *Texas and Pacific Ry. Co. vs. Archibald*, 170 U. S., 665. This is also a case of defective appliances, the particular appliance being on a railroad car received by the defendant company from a connecting company which was in a defective condition. It appears that the railroad company was not in the habit of inspecting such cars. The defendant below asked the court to instruct the jury that "if the plaintiff knew or by the exercise of ordinary care could have known that it was the *custom* of the defendant company *not to in-*

spect cars," and in the second instruction asked the jury to be told that, "If they believe it was the *custom* of the defendant company *not to inspect or repair cars* thus brought over to be loaded and returned, and the plaintiff knew of this custom or could have known of it by the exercise of ordinary care," that in each case he assumed the risk of being injured by any defect in the car and could not recover

The court (p. 671) says:

"These requests the court gave, except in the first it omitted the words . . . 'by the exercise of ordinary care could have known' and the second 'or could have known it by the exercise of ordinary care.' The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the employer to furnish appliances free from defects *discoverable by the exercise of ordinary care*, and that the employe has a right to rely upon this duty being performed, and that whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employe with respect to *appliances furnished* . . . But no reason can be found for, and no authority exists supporting the contention that an employe, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of *appliances* being furnished which contain defects that might have been discovered *by reasonable inspection*. The employer, on the one hand, may rely on the fact that his employe assumes the risks usually incident to the employment. The employe, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to danger in using appliances containing such defects because of his knowledge of the *general methods* adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred

therefrom that danger of unsafe appliances might arise. . . .

"In assuming the risks of the *particular* service in which he engages, the employe may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish *appliances reasonably safe* for the purpose for which they are intended; and whilst this does not justify an employe in using an appliance which he knows to be defective, *or relieve him from observing patent defects therein*, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. In *Davidson vs. Cornell*, 132 N. Y., 228, the court said:

"*'It is, as a general rule, true that a servant entering into employment which is hazardous, assumes the usual risks of the service, and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation.'* *Gibson vs. Erie Railway Co.*, 63 N. Y., 449, 20 Am. Rep., 552; *De Forest vs. Jewett*, 88 N. Y., 264; *Sweeney vs. Berlin & J. Env. Co.*, 101 N. Y., 520, 5 N. E., 358, 54 Am. Rep., 722; *Hickey vs. Taaffe*, 105 N. Y., 26, 12 N. E., 286; *Williams vs. Delaware, L. & W. R. Co.*, 116 N. Y., 628, 22 N. E., 1117." The very cases already quoted from.

The court adds:

"Those *not obvious* assumed by the employe are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures and appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowl-

edge of the situation, is such as *is apparent to his observation*. Kain vs. Smith, 89 N. Y., 375; McGovern vs. Central Vt. R. Co., 123 N. Y., 280, 25 N. E., 373."

This case has been repeatedly cited and bears out fully the contention here made as to obvious defects; and we know of no case showing or tending to show that where a defect is obvious to ordinary observation and the employe has had reasonable opportunity so to observe, that in addition to evidence establishing these facts it is necessary to show that he knew of the *exact* condition of any particular portion of the structure or appreciated a particular danger in connection therewith other than that which *the law assumes* from the fact that the *condition was obvious* and that he had had ample opportunity to observe it and infer therefrom in the exercise of ordinary care the dangers incident to its existence.

In Sweeney vs. Berlin, etc., Co., 101 N. Y., 520, 54 A. R., 722, cited above with approval by the United States Supreme Court in the Archibald Case, the rule is thus laid down:

"The servant accepts the service, subject to the risks incidental to it, and where the machinery and implements of the employer's business are at that time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards. De Forest vs. Jewett, 88 N. Y., 264, where a car coupler stepped into a sluice in defendant's yard and was run over. Hayden vs. Smithville Mfg. Co., 29 Conn., 548, where an employe in a mill received an injury to his hand by being caught in the gearing of a spring frame. In Gibson vs. Erie Ry. Co., 63 N. Y., 449; s. c., 20 Am. Rep., 552, the last case is cited with approval, and the rule applied where an employe was killed by a projecting roof. Under such circumstances, the servant is regarded as voluntarily taking the risks resulting from the use of the machinery,

unless, as is said, the master by urging on the servant, or coercing him into danger, or in some other way directly contributes to the injury, or assumes the risks. . . . It is plain that the knowledge of the danger to the plaintiff was inherent in the use of the machine, and to the work itself; the peril did not grow out of extrinsic causes or circumstances which could not be discovered by the use of ordinary precaution, nor to a condition of things different from those existing at the beginning of the service. It was part of the plaintiff's engagement that the master's work should be performed in the usual course and way of business. The work which the servant was called upon to do at the time in question was not of a different character from that which he originally undertook; and the machine upon which it was to be done was then one in use. No new duty or species of labor was imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that for which he was engaged, and the doing of which formed the consideration of his employment."

Every word of which applies to the case at bar.

The same principle is announced in the case of *Kohn vs. McNulta*, 147 U. S., 238, where (p. 241) Mr. Justice Brewer says:

"But inasmuch as he had in fact seen and coupled cars *like the ones* that caused the accident and that more than once, and as the dead woods were *obvious* to anyone attempting to make the coupling, and the danger from them apparent, it must be held that it was one of the risks which he assumed in entering upon the service."

And again:

"But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowl-

edge to detect it. The intervenor was no boy placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to anyone. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

The same question was discussed by Mr. Justice Shiras in the case of *Southern Pacific Co. vs. Seley*, 152 U. S., 145, who gathered a number of Federal cases on the subject, citing also *Sweeney vs. Berlin & L. Env. Co.*, 101 N. Y. 520. He also cites the case of *Randall vs. B. & O. R. Co.* 109 U. S., 478, and quotes therefrom as follows:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad company, in any work connected with the making up or moving of trains, assumes the risk of that condition of things. . . . The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been."

"In *Washington & G. R. Co. vs. McDade*, 135 U. S., 570, this court used the following language: 'Neither individuals or corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed.'

"In the case of *Tuttle vs. Detroit G. H. & M. R. Co.*, 122 U. S., 189, it was claimed that a brakeman, who was injured in coupling cars, had a right to go to the jury on the question whether the defendant company was not negligent in having too sharp a curve in its road where it entered a yard. Mr. Jus-

tice Bradley said: 'Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that the public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less it should be left to the varying and uncertain opinions of juries to determine such an engineering question (just as the principle here). . . . It is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demands. The perils in the present case arising from the sharpness of the curve, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employees have reason to suppose is in proper working condition. *Everything was open and visible*, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it, for it is one of those things which happen, in the course of his employment, under such conditions as existed here.'

"The evidence showed that Seley had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of frog there in use; and it is not known that he ever complained to his employers of the character of frogs used by them. He must, therefore, be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs."

These principles have been thoroughly recognized and followed by the Court of Appeals of D. C. in *Hayzel vs. Columbia Ry. Co.*, 19 App. D. C., 359; *Butler vs. Frazee*, 25 App. D. C., 302.

In the last case cited (p. 403) the court says:

"The doctrine of law is established beyond question, that where an employe undertakes and continues the use of defective and unsafe appliances, either with actual notice of such defect, or where the same is open to ordinary observation in the usual course of its use, he must be deemed to have accepted the risk of all danger reasonably to be apprehended from such use, and cannot recover of his employer. *Southern P. Co. vs. Seley*, 152 U. S., 145, 155.; *Washington & G. R. Co. vs. McDade*, 135 U. S., 554, 570; *Texas & P. R. Co. vs. Archibald*, 170 U. S., 665, 673; *Hayzel vs. Columbia R. Co.*, 19 App. D. C., 359, 371; *Crowley vs. Pacific Mills*, 148 Mass., 228, 19 N. E., 344.

It is assumed to be unnecessary to argue the propositions that the assumption of risk arises from an implied condition in the contract of the service, and that the servant takes upon himself the risks attending the performance of the service which he has engaged to perform, including, at common law, the injuries which might arise from the negligence of fellow-servants. *Bailey on Personal Injuries*, vol. 2, sec. 353, 2d Ed. Nor that with the single exception of injuries arising from the negligence of fellow-servants and the federal defective appliance laws that the Federal Employers' Liability Law leaves the common law doctrine on this subject unaffected. *Seaboard Air Line vs. Horton*, 233 U. S., 492; *So. Ry. vs. Crocket*, 234 U. S., 725; *Jacobs vs. Southern Ry.*, 241 U. S., 229.

The text writers, in discussing the doctrine of assumption of risk, generally classify them as (a) ordinary, (b) obvious, (c) known risks. *Bailey on Personal Injuries*,

vol. 2, sec. 356, 2d Ed. Mr. Bailey says, however, that this classification is not a practical one since the entire basis of the doctrine of assumed risks "is in all cases the servant's *knowledge or means of knowledge* of the risk," but he adds: "In so far as ordinary risks are concerned it is *conclusively presumed* that the servant had knowledge thereof or that he should have knowledge in the exercise of ordinary care, while in regard to *obvious risks* if the servant has not in fact knowledge of the danger and defect the exemption of the master from liability is based on the fact that the servant *should have known* of the risk by the exercise of ordinary care. It will be seen that the basis of such a classification is as a matter of fact wholly one of *knowledge or means of knowledge* of the defects and danger. (Sec. 356.) And in note 32 to this section it is said:

"Known risks, of course, are those of which the servant has knowledge and they may be either *ordinary risks* in the sense of being incidental to the employment or they may be *obvious* so that the servant *should have known* thereof by the *use of his faculties*, or they may be risks of which the servant is *actually informed* by the master or his representatives. So it will be seen that the question of *knowledge* of the risk, or *notice of facts which should have imparted* knowledge to the servant, is the basis of all the doctrine of assumed risk. Stated in another way, the servant does not assume the risk of injuries arising from *latent defects of which he has no knowledge* where it is not his duty to discover such defects."

From which it will be seen that the servant assumes: First, all the risks of his employment in so far as they are *incidental* to the employment. These are assumed whether known to the servant or not. Second, as to risks not incidental to the service he assumes the risk of all that are *obvious or patent*, and, third, of all *latent defects of which*

he has actual knowledge, and in addition, fourth, such other *latent defects as it is his duty to discover*. And the doctrine applies to *obvious risks* even though *they* may arise out of the same negligence of the employer. *Seaboard Air Line vs. Horton*, 233 U. S., 492; *Jacobs vs. Southern Ry.*, 241 U. S., 229.

"Risks of danger are logically classified as ordinary or extraordinary. The question as to the latter is presented when there has been some failure of duty on the part of the master, and they may be divided into two classes; *obvious risks* and *known risks*, the former existing where the defect or risk is apparent, *without proof of actual knowledge*, and the other where in *fact* the defect and danger therefrom are actually *known*. As to extraordinary risks, when he accepts or continues in the employment with knowledge of the *character of structures* from which injury may be apprehended, or of neglect on the part of the master or those who represent him as to appliances, methods or other duties which threaten injury, he also assumes the hazards incident to the *situation*." *Bailey on Personal Injuries*, Vol. 2, sec. 356, 2d Ed.

The same author, continuing, says (sec. 356) :

"Ordinary risks are those incident to the business, which are impliedly assumed by the contract of employment; and extraordinary risks the risks of negligence of the master which are not assumed unless known by the servant or they should have been known by him in the exercise of ordinary care. In other words, ordinary risks are always assumed, but extraordinary risks are not assumed unless (a) known or (b) obvious."

It can scarcely be said that the risk of coming in contact with trolley poles adjacent to the tracks of trolley lines is *not an ordinary risk* unless we assume that it is a duty of

electric railway companies to so place their trolley poles as to make it impossible for a conductor, through any possible *contortion of his body*, to stand upon a running-board and come in contact with the pole.

In the case of *Thain vs. Old Colony R. Co.*, 161 Mass., 353, 37 N. E., 309, the Supreme Judicial Court of Massachusetts, in discussing this very question, said:

"It is necessary for railroad companies to put up structures near enough to their tracks for it to be possible for persons on the trains to come in contact with them. Parallel tracks usually must be laid near enough to each other to create a similar danger between trains moving in opposite directions. The company is not bound to give warning of every such structure to every person employed on its trains. There must be some point within the limit which it is possible for a man on a train to reach at which the railroad company has a right to build *without notice*, and to *assume* that those on the trains *will keep out of the way*. Every one knows that there is danger *as soon as he gets outside of the line of the train* when it is in motion . . . and on that ground it is held that the passenger puts any part of his person beyond that line at his peril. *Todd vs. Old Colony & Fall River R.*, 3 Allen, 18. We assume that the rule is not so strict in the case of employes whose duties may require them not to confine themselves within the same line at all times. . . . It may be held that they ought not to be held to take the risk of things four feet off in all cases. But we are of opinion that the plaintiff took the risk of things at that distance."

Four feet two inches is the distance which this pole was from the rail at a height four feet from the ground.

We submit that it is a fact of common knowledge of which the courts can take judicial notice, that trolley poles located 4 feet from a track and $2\frac{1}{2}$ feet, or even 2 feet, from the uprights on the side of a car, afford ample room

for a conductor compelled to stand upon a running-board, provided he exercises *any reasonable degree of care at all* for the safety of his person. Doors are frequently less than two feet wide. The sides of summer cars are not closed; the greater portion of the body of a conductor can be protected within the line of the car leaving a very small portion of it extending beyond the actual line of the running-board; and we know from common observation that this is done every day by conductors. It was done on this very line scores of times daily for ten years without accident.

IV.

Even if there was evidence on any of the above points to sustain a finding of the jury against the appellant, such evidence merely raised disputed questions of fact thereon and the court erred in instructing the jury peremptorily in regard thereto in the following respects:

- (a) In granting appellee's prayers 3-A and 5, and in refusing appellant's prayer III-A, VII and IX (Assignments 8, 10, 15, 17, 18):

These prayers can be best discussed together. Appellee's prayer 3-A reads as follows:

"The jury is instructed that the law imposes upon every employer the duty of exercising reasonable care in providing a place reasonably safe and secure in which employes may carry on and perform their respective duties; and that if the jury find from the evidence in this case that the defendant company located and placed the pole, to wit, No. 187, supporting the trolley wire of the defendant company, dangerously close to its tracks and passing cars, and further find that the deceased conductor was knocked from the running-board of the car by the said pole and thereby injured and killed, then their verdict should be for the plaintiff, unless such danger from the location of said pole, if any,

was so obvious that an ordinarily prudent person under the circumstances would have appreciated it" (Rec., p. 63).

Appellee's prayer 5 reads as follows:

"On the question of assumption of risk, the jury are instructed that there can be no recovery in this case if the deceased assumed the risk of injury. Assumption of risk is not the same as contributory negligence. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee. And, in this case, you are instructed that the deceased only assumed such dangers as were normally and *necessarily* incident to his occupation; but that he did not assume risks of another sort, not naturally incident to his occupation and arising out of any failure of the defendant company to exercise due care with respect to placing the trolley pole a safe distance from the running-board of the car. Risks of this sort, arising out of any negligence of the defendant, the jury would not be justified in finding were assumed by the deceased, unless they find first that any negligence of the defendant in placing that particular pole the distance it was from the running-board, and also the risk of danger therefrom to a person passing while on that running-board, under the circumstances of this case, were both alike known to the deceased, or were both so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated it" (Rec., pp. 57, 58).

The converse of this last instruction was stated in the appellant's prayer IX, rejected by the court. It reads as follows:

"The court instructs the jury that even though they believe from the evidence that the defendant was negligent in placing its trolley poles in dangerous proximity to its tracks, yet, if the jury further

believe from the evidence that the location of the said trolley poles was known to the plaintiff's decedent, or that he had been working as a conductor on the cars of the defendant company passing those trolley poles at frequent intervals for several months, and that the poles had been located at the same place for many years prior to the accident and that the decedent had failed to make complaint or objection on account of the location of said trolley poles, then he assumed the risk of danger from their location, if there was any danger in it, and the jury should return their verdict for the defendant" (Rec., pp. 61, 62).

This prayer was taken almost bodily from the prayer granted by the Supreme Court of Appeals of Virginia in *Jacobs vs. Southern Railway*, 116 Va., 195, and affirmed by this court on May 22, 1916, in 241 U. S., 229, 232, 233.

The abstract proposition contained in the first clause of the appellee's prayer 3-A is possibly without exception, but it is purely abstract and does not relieve the residue of this prayer of the manifest errors embodied in it when it attempts to apply this abstract proposition concretely to the facts of this case, when the jury is told in effect that if the pole was *dangerously close* to the track and that the conductor was knocked from the running-board of the car by the *particular pole No. 187*, then their verdict should be for the plaintiff unless the danger from the location of that particular pole was so obvious that an ordinarily prudent person under the circumstances would have appreciated it.

It has already been pointed out (ante, p. 116), that the location of the particular pole No. 187 or any other particular pole is not alleged in any count of the declaration as negligent. The allegation of the declaration is that *all* of the poles constituting a line of "upright *posts or poles* along the outer tracks of the said line" were negligently placed too near to the cars.

It is readily appreciated that a declaration which states

that one of a line of poles all dangerously near a track by reason of its non-alignment with other poles in its vicinity might be additionally dangerous by the mere fact of its not being in alignment, and constitutes a very different allegation of negligence from a declaration which, without specifying any irregularity in the alignment, alleges the entire line to be negligently placed in dangerous proximity to the pole.

This prayer in this particular permits a recovery upon a ground of negligence not stated in the declaration and as to it, therefore, the appellant was not put on notice. *Garrett vs. Railroad Co.*, 235 U. S., 308.

Prayer 3-A is again erroneous in that it makes *danger* to employes the ground of liability instead of negligence.

"It is not true that a railroad company is to be regarded as negligent in erecting or maintaining contrivances or things in the operation of their roads for the reason that they are dangerous to persons operating the trains. Indeed, the whole business of operating trains is dangerous; it is full of peril to those employed. Where there is danger it does not follow that the companies are negligent as to the thing from which the danger springs. The instruction should have expressed the thought that if the crane was dangerous to persons operating trains *in the exercise of ordinary care* the defendant was negligent in constructing it. . . . The means which a person has of knowing that under the circumstances he will expose himself to peril are taken *in law to be evidence of knowledge of that fact.*" *Gould vs. Railway Co.*, 66 Iowa, 590.

The trial court in that case, as in this, charged that if the jury found the water column was placed in such proximity to the track as to be dangerous to persons operating trains they would be justified in finding that the defendant was negligent. It was this prayer that the court in the language above quoted held to be erroneous because it did not express

the thought that it must be dangerous to *persons in the exercise of ordinary care*.

The appellant attempted to get the court to express this thought in somewhat different terms to the jury in its prayer III-A (Rec., 67) as follows :

"If the jury believe from the evidence that the plaintiff's decedent received his injury by reason of failure to grasp one of the stanchions or losing his footing as he passed along the running-board thereby protruding his body further than usual beyond the outside line of the car and thus causing his body to come in contact with a trolley pole, their verdict should be for the defendant."

But the court declined this prayer to the prejudice of the appellant.

The appellee's prayer 3-A is further erroneous in that it makes the dangerous proximity of the pole to the track the sole criterion of liability on the part of the appellant, whether such dangerous closeness was the proximate cause of the injury or not. The prayer says that if the particular pole No. 187 was placed—(whether negligently so placed or not)—dangerously close to its tracks and the deceased conductor was knocked from the running-board of the car by the pole, then there must be a verdict in favor of the appellee, without regard to what caused the conductor to be knocked from the car, with the single exception as expressed in its prayer, "unless such danger from the location of the pole was so obvious that an ordinarily prudent person *under the circumstances* would have appreciated it."

The case of the appellant, supported by the evidence, was that the proximity of the pole as a *proximate cause* had nothing to do with the injury in this case; that the decedent lost his foothold on the running-board without negligence on the part of the appellant, from some unknown cause and in all probability without negligence on the part of the de-

cedent, but merely by reason of some unforeseen circumstance not developed by the evidence.

The appellant sought to have the court charge the jury on this point in the following terms by its prayer VII, which was refused (Rec., p. 61) :

"The court instructs the jury that there was no duty on the defendant company to anticipate a negligent or unusual manner of performing his duty on the part of the servant, or to render the servant safe from injuries resulting from his negligent method of performing his duty or from unforeseen accidents or occurrences" (Rec., p. 61). See *Reese vs. Phila & R. R. Co.*, 239 U. S., 463.

The trial court refused this prayer also, upon the theory that it was contrary to the provisions of the Federal Employers' Liability Law, which provides that contributory negligence shall not bar a plaintiff's right of recovery.

It is respectfully submitted, however, that this prayer does not deal and was not intended to deal with the subject of contributory negligence. It was dealing with proximate cause and primary and original negligence on the part of the appellee and appellant respectively, and told the jury that it was not negligence for the appellant to fail to anticipate or provide against a negligent or unusual manner of performing his duty on the part of the servant, and that it was not the master's duty to render a servant safe from injuries resulting from his own negligent method of performing his duties or from unforeseen accidents or occurrences. Manifestly if the element of negligence in a case is that the plaintiff owing to his own neglect or unusual manner of performing his duty is injured, then his negligence is the sole cause of his injury and he can not blame the master because he failed to anticipate that the servant would be negligent and failed to guard against the result of such unforeseen negligence.

This prayer, appellant's VII, was clearly right and should have been granted, and further illustrates the vice in appellee's prayer 3-A. It is not apprehended that the Federal Employers' Law does away with the well established doctrine that in addition to proving negligence the burden is on the plaintiff to prove that such negligence was the *proximate cause* of the injury; that is, there must be a casual connection shown between the negligence and the injury. Appellee's prayer 3-A loses sight of this important connecting link between the negligent act and the ensuing injury. It will hardly be held that a railway company could be held responsible for injuries to a conductor even though a pole was located not only dangerously but negligently close to a track if the conductor was injured by the act of a passenger in knocking him from a car just as he happened to be passing the pole, with the result that the pole did strike him. In the same way, even though the jury should believe that pole No. 187 was unnecessarily close to the track and the conductor was knocked from the running-board by the pole, the company should not be held responsible if it also appears that through misfortune or other unforeseen circumstances the decedent before reaching the pole lost his footing or his grasp of the handle bar and was thereby swung farther from the car than it would have been reasonable to have expected that he could or would be thrown and thereby struck the pole. There would in such a case be missing the essential element of *proximate cause*. It would be a danger which could not reasonably have been *anticipated* even though the presence of the pole at the particular point was negligence.

Again, this prayer is erroneous because it is peremptory and instructs a verdict merely upon the finding of the two facts therein mentioned—the dangerous proximity of the pole to the track, followed by the conductor being knocked from the running-board by the pole—and disregards and holds for naught the evidence of the appellant

showing or tending to show (1) actual knowledge on the part of the decedent of the location of this and other poles, and (2) that the decedent was brought in contact with the pole, not by reason of its dangerous proximity to the track under ordinary circumstances, but by reason of the fact that he had lost his footing or missed his grasp on one of the handle bars as he passed down the running-board. *Sullivan vs. Capital Traction Co.*, 34 App. D. C., 358, 365; *De Yturbide vs. Metropolitan Club*, 11 App. D. C., 180.

Prayer 3-A is further erroneous in that it applies the Federal Employers' Liability Law to a street-car employee.

This question has already been discussed.

Appelle's prayer 5 in the first three sentences states correctly certain abstract principles as to which there can be no objection, but it is hard to see what assistance they could have rendered the jury in determining this case. Like prayer 3-A, when it goes to apply the abstract principle concretely to the case at bar, it is erroneous in announcing that the servant only assumes such dangers as are normally and necessarily incident to the occupation. If the principle had been confined to concealed and undisclosed dangers there could probably be no valid objection.

"Necessary" is a very strong term to apply to any obvious danger. There is probably no danger that can not by some means within the limits of *necessity* be avoided. We know of no authority that lays down the doctrine of assumed risk in such broad terms as this prayer when referring to obvious conditions.

- (b) In refusing appellant's prayer IV in respect to the facts from which both knowledge and assumption of risks are assumed. (Assignment 16.)**

This prayer is in the following terms:

"The court instructs the jury that some employments are necessarily fraught with danger to the

workmen engaged therein, and that such dangers as are ordinarily incident to the employment as it is actually and ordinarily conducted and are obvious to a man exercising ordinary care for his own safety, are presumed to be assumed by the employe, whether he is actually aware of them or not; and even as to dangers and risks not necessarily incident to the occupation but which may arise out of a failure of the employer to exercise due care with respect to providing a safe place of work which are obvious to ordinary observation, an employe, as soon as he becomes familiar with his place of work and the conditions surrounding the same, without objection, is likewise presumed to have assumed."

The principle involved in this prayer has been amply vindicated in the discussion of the doctrine of assumed risks, and what has been said there will not be repeated here further than to again cite the following authorities:

- Bailey on Personal Injuries, Vol. 2, 2d Ed., sec. 356.
- Gould vs. Railway Co., 66 Iowa, 590.
- Power Company vs. Murphy, 115 Ind., 566, 18 N. E., 30.
- Ryan vs. Railway Co. (Mass.) 47 N. E., 877.
- Tuttle vs. G. H. & M. Ry., 122 U. S., 189.
- Bengston vs. Railway Co., 47 Minn., 486.
- Carbine vs. Railroad Co., 61 Vt., 348.
- Gibson vs. Erie Railroad Co., 63 N. Y., 449, 20 Am Rep., 552.
- Butler vs. Frazee, 25 App. D. C., 392.
- Fleming vs. Railroad Co. (Minn.), 6 N. W., 448.
- Seaboard Air Line vs. Horton, 233 U. S., 492.
- Texas & P. Railway Co. vs. Archibald, 170 U. S., 662.
- Kohn vs. McNulta, 237 U. S.

**The Court Erred in Refusing Appellant's Prayer X.
(Assignment 19.)**

This prayer reads as follows (Rec., p. 66) :

"Even though the jury may believe from the evidence that the plaintiff is entitled to a recovery as the result of negligence on the part of the defendant, still the jury has no right to allow the plaintiff speculative, imaginary or conjectural damages, or any damages which are not fairly and satisfactorily established by a preponderance of the evidence, to be justly compensatory for pecuniary injuries actually inflicted on and suffered by the next of kin of the decedent as a direct and proximate result of the decedent's death."

It will be noted that this prayer confined the recovery to pecuniary injuries suffered on the part of the appellee, and the principles involved have heretofore been thoroughly discussed in connection with the amendment of the declaration.

The judgment is manifestly erroneous and this court is therefore asked to reverse the same.

* All of which is respectfully submitted.

JOHN S. BARBOUR,
Attorney for Appellant and Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

No. 826.

WASHINGTON RAILWAY AND
ELECTRIC COMPANY, *Plain-*
tiff in Error, and Petitioner.

vs.

ANN CATHERINE SCALA, Ad-
ministratrix of the Estate of Alvin
Joseph Scala, Deceased, *Defen-*
dant in Error, and Respondent.

In Error, and on
Petition for Cer-
tiorari to the
Court of Appeals
of the District of
Columbia.

BRIEF

OF DEFENDANT IN ERROR AND RESPONDENT.

ON MOTION TO DISMISS WRIT OF ERROR;

IN OPPOSITION TO CERTIORARI; AND

ON MERITS OF THE CASE.

**ON MOTION TO DISMISS WRIT OF
ERROR**

On the 26th day of March, 1917, there was submitted in open Court, on behalf of Defendant in Error, the Motion to Dismiss the Writ of Error herein, on the ground that the judgment of the Court of Appeals of the District of Columbia heretofore rendered in this cause on the 4th day of December, 1916, was final in

said cause, and that writ of error does not lie thereto, and that this Honorable Court, therefore, has no jurisdiction to review *by writ of error* said judgment of the Court of Appeals. This Honorable Court, without passing upon said Motion, on the 9th day of April, "ordered that this case be placed on the summary docket, and assigned for argument on Monday, May 7, next," 1917.

In connection with the motion to dismiss the writ of error herein, the following points are respectfully suggested for consideration by this Honorable Court, in addition to the grounds set forth in the printed Motion and supporting Brief heretofore submitted and filed herein by defendant in error:

FIRST.

It is respectfully submitted that the provisions as to the District of Columbia were inserted in Section 1 of the Act of 1908, to cover interstate commerce to and from the District, because the District is not a State or Territory, and Congress intended to cover all phases of interstate commerce for which it had power to legislate. That Section 1 applies to interstate commerce to or from the District *only when the injury occurs OUTSIDE of the District* is clearly shown by the fact that Section 2 of the Act of 1908 does not employ the language of Section 1 ("in such commerce"), but Section 2 expressly provides that the carrier is liable to any employee "suffering injury * * * in any of said jurisdictions."

In other words, if, in the case at bar the accident had occurred *after* the car had passed the District line and had entered into the State of Maryland, or, if the accident had happened on the return trip while the car was still in Maryland and before it returned into the Dis-

trict, the case would be governed by Section 1 of the Act; but, in view of the precise use of terms in Section 2 of the Act, the case at bar is controlled by Section 2 because the employee suffered injury *in the jurisdiction* of the District of Columbia.

If the above is not a correct interpretation of the Act, then Section 2 was but an idle and futile enactment by Congress, without practical application. Congress, when legislating, is presumed to know conditions in the District, and to have known that there is not "a common carrier by railroad," trolley or underground electric, street, suburban, interurban, or steam, doing business in the District, that does not extend its lines directly, or by transfer, beyond the territorial limits of the District, and thus do an interstate business with employees engaged in interstate commerce.

SECOND.

The argument in the "Reply Brief" of plaintiff in error filed in this Court in opposition to defendant's in error Motion to Dismiss, in respect to Sections 3 to 9 of the Act of 1908, being general provisions applicable to all jurisdictions, and that Section 2 cannot be solely enforced without the aid of those subsequent sections, presents a situation which has never been contended for by defendant in error. The contention of defendant in error is, that when the case is governed by the local statute, namely, Section 2 of the Act, that then necessarily Sections 3 to 9 are ancillary to and become part of the local statute. That, in a local case, *all* sections of the Act apply *except* Section 1; that in an interstate case, where the injury occurs *outside* of the District, *all* sections except Section 2 apply.

THIRD.

If this Honorable Court should determine that it has jurisdiction to review this cause by writ of error for the reason that it involves the Employers' Liability Act of 1908 (35 Stat. L., 65) as amended by the Act of 1910 (36 Stat. L., 291) and for the reason that said Act of 1908 is not (even when the injury and death occur in the District of Columbia) a local statute for said District, but is a general "law of the United States" within the meaning of section 250 of the Judicial Code, and after so holding, this Honorable Court should, therefore, deny the motion to dismiss the writ of error, *then* it may be necessary for this Honorable Court to determine whether or not plaintiff in error is a "railroad" within the meaning of said Act of 1908.

FOURTH.

If this Honorable Court should determine that plaintiff in error is not a "common carrier *by railroad*" within the meaning of said Act of 1908, then, in the event of said ruling, it is respectfully urged on behalf of defendant in error that the judgment of the Court of Appeals should not be reversed, but that this Honorable Court should dismiss the writ of error herein, because this cause (on the allegations in the declaration and on the evidence) would be governed not by said Act of 1908 as amended by said Act of 1910, but by the Employers' Liability Act of 1906 (34 Stat. L., 232). This Court in the Employers' Liability Cases, 207 U. S., 497, while holding that said Act of 1906 was invalid in so far as it attempted to regulate inter-state commerce, intimated that it was valid so far as the District of Columbia and Territories were concerned, and said that

it was intended to include "trolley lines." And, in the case of *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S., 97, it was expressly held that said Act of 1906 was valid so far as it regulated commerce *within* the Territories and the District of Columbia. The Act of 1908 provided that the Act of 1906 was not repealed thereby.

In the case of *Wash., A. & Mt. V. R. Co., v. Downey*, 236 U. S., 190, which came before this Court on writ of error to review a judgment of the Court of Appeals of the District of Columbia in a case under said Act of 1906, this Court, without passing on the merits of said case, *sua sponte*, dismissed the writ of error for want of jurisdiction. The Downey case is cited and discussed in the printed motion to dismiss and supporting brief heretofore filed herein, and it is only desired here to call attention to the fact (if it should be said that the motion heretofore made herein was predicated only on the Act of 1908), that in the Downey case, this Court, *sua sponte*, dismissed the writ of error.

If defendant in error is not "a common carrier *by railroad*," it is nevertheless "a common carrier engaged in trade or commerce in the District of Columbia" (language of Act of 1906), and, under the decision of the Downey case, *supra*, judgments of the Court of Appeals of the District of Columbia in causes under said Act of 1906 cannot be reviewed by this Court *by writ of error*.

IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

It is felt that this Honorable Court will decide that the petition for writ of certiorari heretofore submitted herein was not "duly applied for within three months after entry of the judgment or decree complained of," because section 4 of rule 37 of the rules of this Court was not amended until on March 26, 1917, *after* the printed brief of defendant in error (respondent on certiorari) was filed herein on March 1, 1917, objecting, among other grounds, that said petition was not duly submitted in time.

It is respectfully urged that, in the event this Court dismisses the writ of error herein, and should determine said petition was submitted within time this cause should not be reviewed on certiorari, or, at all events, the judgment of the Court of Appeals of the District should not be reversed on certiorari, for the following reasons, in addition to the grounds of objection set forth in the said printed brief of respondent heretofore filed herein.

If the writ of error is dismissed on the ground that this cause is governed not by the Act of 1908, but by the Act of 1906, and, therefore, this Court is without jurisdiction, nevertheless the judgment of the Court of Appeals should not be reviewed or reversed by certiorari because in the case at bar the allegations of the declaration, the evidence, and the charge of the trial Court are free from errors and make out a case that may be sustained as well under the said Act of 1906 and the decisions thereon. It is, therefore, immaterial that the trial Court, the Court of Appeals, and even the parties may have been under the impression that the case was controlled by the Act of 1908, if it be shown that the

pleadings, evidence, and the Court's charge, as certified by the Record herein, would have produced the same verdict and judgment under either the Act of 1906 or 1908.

IT WAS NOT NECESSARY TO PLEAD THE STATUTE.

It was not necessary to allege in the declaration, and the declaration herein does not aver, whether the action was brought under the Act of 1906, or 1908; it was essential only to allege facts bringing the case within the provisions of the controlling statute; *Railroad Co. v. Lindsay*, 233 U. S., 42; *Garrett v. R. R. Co.*, 197 Fed. 715, affirmed in 235 U. S., 308; *Railroad Co. v. Slavin*, 236 U. S., 454; *Railroad Co. v. Wulf*, 226 U. S., 570.

The only references to the Statute controlling the case to be found in the report of the proceedings in the trial court are to be found on the following pages of the Record: pp. 10, 13, 33, 61, 67, 68, 69 and 70.

Page 10; in the 4th ground of Motion for New Trial (which was improperly included as part of the Record): "Federal Employers' Liability Law," without stating whether that of 1906 or of 1908. Both acts are in force in the District.

Page 13; in the 3rd and 4th assignments of error, after trial; also the reference is general, and does not state whether the Act of 1906 or 1908 is relied on.

Page 33: Counsel for plaintiff stated that certain private statutes were formally offered in evidence "in order to comply with the employers' liability act." Counsel for defendant in his brief seems to lay great stress on these statutes, contending that they establish that defendant is not a "common carrier *by railroad*." Assuming, for the sake of argument, that those statutes do show that defendant is not a "railroad," never-

theless they conclusively show that defendant was chartered "as a common carrier engaged in trade and commerce in the District of Columbia."

Page 61; plaintiff prayer No. 4 says that "the Act of Congress under which this suit was brought provides that such contributory negligence," etc., without stating whether it was the Act of 1906, or that of 1908. Moreover, the rule as to contributory negligence is the same under both said Acts.

Page 66-67; counsel for defendant, in objecting to the claim for conscious pain and suffering being allowed to go to the jury, said no such recovery was permissible "under the Employers' Liability Act of 1908 and Amendment of 1910." So far as the Record shows, up to that time there was nothing in the record for counsel for defendant to assume the claim was made under the Act of 1908 as amended in 1910, and not under the Act of 1906. Moreover it must be borne in mind that there may be a recovery for conscious pain and suffering under either the Act of 1906, or under the Act of 1908 as later amended.

Page 68; the remarks by the trial Court were subsequent to objection of counsel noted on pp. 66-7-8.

Pages 69, 70; the trial Court, in charging the jury, stated that the 3rd and 4th counts of the declaration set out a cause of action under "the Employers' Liability Act passed by Congress some years ago and subsequently amended," and later (bottom of p. 69) used the exact words of plaintiff prayer No. 4 as set forth on page 61 of the Record, *supra*, and on page 70 instructed the jury as to contributory negligence. The fact that the trial Court may have been under the impression as indicated by his language instructing the jury, that the pertinent statute was that of 1908 as amended in 1910, does not constitute reversible error, although the pertinent statute

was that of 1906, in view of the fact that his charge was equally fair and correct under either act, because there may be a recovery for conscious pain and suffering, and the rule as to contributory negligence is the same, under either Act. The same observation may be made in respect to the opinion of the Court of Appeals (R. 75-80). Merely because that court also may have misconceived which of the two similar acts was applicable to the case likewise does not constitute reversible error or require that the case be remanded for a new trial. It should be borne in mind that not one of the assignments of error herein (R. 13-4) is based on the action of the trial court in admitting or excluding evidence; they are mainly attempted to be predicated on the Court's instructions to the jury. As previously stated, those instructions were correct, either under the Act of 1906 or under the Act of 1908 as amended. If the trial judge had instructed the jury that the action was brought under the Employers' Liability Act of 1906, and then had charged the jury in all other respects as set forth in the Record the verdict of the jury would have been the same as that which was rendered, because

UNDER THE ACT OF 1906 THERE MAY BE A RECOVERY FOR CONSCIOUS PAIN AND SUFFERING OF A DECEDENT.

There could be no recovery for conscious pain and suffering of a decedent, under the Act of 1908, until it was amended by the Act of 1910. But the language of the Act of 1906, defining the extent of recovery thereunder differs essentially from that of the Act of 1908 unamended. The latter Act, previous to the amendment

of 1910, gave a right of action for damages to an employee

"suffering injury, * * * *or*, in case of the death of such employee, to his or her personal representative, for the benefit of" certain designated next of kin, "for such injury *or* death resulting from the negligence."

In other words, in the case of death, the personal representative of the decedent could recover damages only for the wrongful death, that is, only the pecuniary loss to the designated next of kin by reason of the death of the employee. In the Act of 1906, however, it was provided :

"That every common carrier * * * shall be liable to any of its employees, or, in case of his death, to his personal representative for the benefit of * * * *for all damages* which result from the negligence," etc.

As was said in the case of *Wines v. B. & O. R. R. Co.*, 37 Wash. Law Rep., 472 (Supr. Ct., D. C.) :

"The new Act (1906) permits a recovery of 'all damages which may result from the negligence.' This language is certainly broad enough to include the damages which the decedent sustained in his lifetime. Moreover, the act expressly permits a recovery by the decedent, and then adds that in case of his death there may be a recovery by his personal representative, and the words defining the extent of the recovery are the same with reference to a recovery by the em-

ployee himself or a recovery by his representative, namely, 'of all damages which may result from the negligence.' The only difference is that if the recovery is by the representative it is to be for the benefit of certain relatives of the decedent, and consequently may include such additional damages as have been sustained by them.

* * * Although the time which elapsed between injury to the decedent and his death was probably very brief, it cannot be said as matter of law that there were no damages recoverable for the suffering of the decedent during that time."

In the case of *Hyde v. So. R. Co.*, 31 App. D. C., 466, 474, the Court said that the Act of 1906

"changes the common law in relation to master and servant, by giving the latter a right of action for *all damages* for injuries occasioned by the negligent acts of fellow servants, and modifies the law as to the contributory negligence of the injured person. It then extends this right of action, in case of death, to the personal representative of the deceased."

This decision was approvingly referred to in the case of *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S., 87, 97-8, in the following language:

"While not binding as authority in this court, we may note that the act, so far as it relates to the District of Columbia, was sustained in a well-considered opinion by the Court of Appeals of the District of Columbia."

AMENDMENT.

The fact that under the Act of 1906, the statute of limitations is one year, and under the Act of 1908 two years, is immaterial, because the amendment in this cause merely amplified the original allegations of the declaration and related back in point of time to the filing of the declaration. See pp. 70-89 hereof.

It is, therefore, respectfully submitted that if it should be decided by this Court that the Act of 1906, and not that of 1908, is the statute applicable to this case, the judgment of the Court of Appeals should not be reversed on certiorari nor the case remanded for a new trial.

BRIEF ON THE MERITS OF THE CASE

The Statement in the opposing brief (pp. 1-14) contains so many inaccurate and ex parte allegations not supported by the transcript of record herein, and is so misleading, that it would extend this brief to undue length to point out, line by line, all of said erroneous averments. Therefore, after a concise but fair statement of the case, this brief in its argument will call attention to only a few of the most essential mistakes of the opposing brief in respect to stating the case.

STATEMENT OF THE CASE

Defendant-in-error (plaintiff in the trial court and hereinafter called plaintiff), Ann Catherine Scala, Administratrix of the estate of her deceased son, Alvin Joseph Scala, filed suit January 27, 1914, in the Supreme Court of the District of Columbia, against plaintiff-in-error (hereinafter called defendant), the Washington Railway and Electric Company, claiming damages. (R. 1-8.)

The declaration was in four counts, the 1st and 2d counts were discontinued by plaintiff before trial (R. 9, 17), and hence need not now be considered; the 3rd and 4th counts alleged facts bringing the case within the Federal Employers' Liability Act, and alleged (R. 5-8) that plaintiff's decedent, while in the District of Columbia and engaged in his duties as conductor on one of defendant's cars, was struck by a trolley pole negligently placed and maintained by defendant too close to the track and cars, and was thereby knocked

from the running board of the car and severely injured, and died within an hour after being hit; that he left a father and mother who were dependent upon his earnings and support; that plaintiff claimed \$20,000 in damages as compensation for the injuries suffered by decedent before his death and as compensation for the pecuniary loss suffered by decedent's father and mother.

To this declaration, defendant filed plea of not guilty (R. 9), and issue was joined thereon, April 6, 1914 (R. 9).

The declaration, in both the 3rd and 4th counts thereof, described the injuries suffered by decedent as follows:

"plaintiff * * * was hit or struck by one of the said posts or poles, * * * and was thereby knocked from said car violently to the ground and his backbone or spine at or near the base thereof, was thereby crushed and broken, and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages, in direct consequence whereof the said deceased died, on, to-wit, the eighth day of July, 1913, within one hour after being hit and struck as aforesaid" (R. 6-8),

and then described the pecuniary injury to decedent's mother and father by reason of his wrongful death, and then claimed damages in the sum of \$20,000 for both these two classes of injuries, or two claims.

The declaration, while specifying the injuries suffered by decedent before death, and alleging that he survived those injuries for about an hour, thus necessarily implying and "pointing" to the suffering of pain by decedent before death, did not contain a distinct averment that

decedent suffered pain between injury and death, and the Record shows that on the day the case was called for trial, October 20, 1915, that:

"On that date and at that time the attorneys for the plaintiff and the attorney for defendant being present in court, thereupon counsel for plaintiff asked leave of the court to amend the fourth count of the declaration by inserting in the 15th line of the last page thereof, after the word 'hemorrhages,' the words: 'and causing him to suffer intense pain and injuries,' and thereupon *counsel for defendant stated to the Court that he did not object to the allowance of said amendment*; and thereupon the Court allowed said amendment, and the case was continued and set for trial the following week." (R. 17.)

The trial commenced Oct. 27, 1915, and after the jury were sworn, counsel for plaintiff made an opening statement to the jury, in the course of which he said:

"We propose to show you, however, that he lived for some time, probably an hour, after the accident, and that he suffered intense pain and agony during that time as a result of these injuries. * * *. He suffered intense pain and agony. We will claim damages for that as well as for the wrongful death of the young man." (R. 17.)

The testimony of plaintiff's witnesses established that decedent was hit and knocked from the car by a trolley pole negligently and carelessly placed and maintained by defendant, negligently too close, or too near, the

passing car; that this pole was located at or near McCoy's Station, in the District of Columbia, about a mile west from Georgetown (R. 51), and that there was a curve in the track at the location of the pole.

The testimony of seven of the witnesses produced on behalf of plaintiff—Hardy (R. 22-3), Burroughs (R. 23-4), Knowles (R. 24), Martz (R. 25), Perry (R. 26-7), O'Donnell (R. 27-8), and Whelan (R. 29-32)—established that decedent survived his injuries for over half an hour or more, and was conscious during that time, and suffered great pain during that time.

The testimony of plaintiff and her husband established the fact of their dependency upon decedent, and the pecuniary loss to them by reason of his wrongful death.

Three of plaintiff's witnesses—Burroughs, Knowles, and O'Donnell—did not witness the occurrence of the injuries, and did not see decedent until about half an hour or more thereafter, and were produced on the stand solely to testify in support of plaintiff's claim for the before-death injuries of decedent, especially on the point that between injury and death decedent suffered conscious pain. No objection was made to the testimony of these seven witnesses on the point of conscious pain, and counsel for defendant cross-examined (R., 24, 28, 32) three of them on that point, including two of the three who testified only on that question.

At the close of plaintiff's testimony, counsel for defendant moved for a directed verdict, on the *sole* grounds of alleged non-negligence of appellant, assumption of risk by decedent, and that decedent losing his foothold was the cause of the accident (R., 41-2). This motion was overruled.

The evidence then produced by defendant was mainly directed to the unsuccessful attempt to show that

there was no negligence on its part in the location and maintenance of the trolley pole in question, and that the said pole was further away from the track than testified to by plaintiff's witnesses, and that decedent was injured because he lost his foothold and in falling was struck by the pole, and that he assumed the risk of injury by that pole. Defendant also introduced evidence bearing on the earnings of decedent; and the testimony of one of its officials claiming it carried no freight; but it introduced no evidence whatsoever bearing on the existence, or lack, of the conscious pain and suffering of decedent before death.

At the close of all the testimony, which was the afternoon of the second day of trial, defendant renewed its motion for a directed verdict (R., 60), assigning as grounds thereof precisely the same grounds as stated in its motion previously made at close of plaintiff's case; and, after this motion had been overruled by the Court, both sides tendered to the Court their respective prayers. At this time plaintiff tendered eight, and defendant thirteen prayers (R., 60).

"And thereupon the Court proceeded to pass upon the tendered prayers; and, having granted plaintiff's Prayer No. 1, no objection having been made thereto by defendant; and rejected plaintiff's Prayer No. 2, defendant having objected thereto; and granted plaintiff's Prayers No. 3, No. 4 and No. 5, over the objections of defendant thereto.

AND THEREUPON THE COURT PROCEEDED TO CONSIDER PLAINTIFF'S PRAYER NO. 6, and defendant objected thereto" (R., 66).

The objections *then* made by defendant are set forth on pages 119-20 hereof, but those objections did not include many of its *now* contentions. Defendant at that time did not raise any question about sufficiency of pleading, nor any question that the claim for conscious pain and suffering was a new cause of action, nor any question about such claim being barred by the statute of limitations. Its main objection was clean cut and directed, without equivocation, to the contention that *in no case* under the Employers' Liability Act could there be a recovery for conscious pain and suffering of a decedent, because the Supreme Court had so held in the Vreeland case (R. 66). After counsel for plaintiff had cited to the Court the more recent decisions of the same Court in the Craft and Leslie cases, "the Court announced it would defer its decision as to the prayers until the following morning, at which time it would pass upon all the Prayers in the case" (R. 67).

The following morning "the Court proceeded to pass upon whether or not the plaintiff could recover in this case both for the pecuniary loss to the mother and father by reason of their son's death, and also for the conscious pain and suffering of the son, if any, in the period of time between the accident and death; and held that plaintiff could recover for both said claims in this case" (R. 67); that is, that the plaintiff was entitled to submit both claims to the jury; but that before so doing the declaration ought to be amended by a specific averment of "conscious pain and suffering," which amendment plaintiff immediately made. (R. 8, 9, 68).

IT WAS THEN THAT DEFENDANT FOR THE FIRST TIME ATTEMPTED TO RAISE THE CONTENTION THAT THE CLAIM FOR CONSCIOUS PAIN AND SUFFERING WAS A NEW ACTION

AND BARRED BY THE LIMITATION OF THE ACT.

The Court overruled defendant's objection; and likewise overruled defendant's request for a continuance on the ground of surprise (R., 68), defendant noting exceptions, and then proceeded to pass upon all the Prayers in the case.

After the settlement of the prayers, the Court charged the jury (R. 69-73); and "thereupon the jury retired and returned a verdict for the plaintiff in the sum of \$7,500" (R. 11, 73) on October 29, 1915.

After the overruling of defendant's motion for a new trial, judgment was entered on verdict in favor of plaintiff for said sum of \$7,500 (R. 11).

This judgment of the Supreme Court of the District was affirmed by the Court of Appeals of the District of Columbia on December 4, 1916 (R. 80-81), and on December 8, 1916, the Court of Appeals allowed a writ of error to remove the case to this Honorable Court (R. 82).

ANALYSIS OF ASSIGNMENTS OF ERROR AND "POINTS" OR ERRORS NOW RELIED ON.

Defendant designated below twenty-two assignments of error (R. 13-4). In defendant's brief the said assignments are not argued in the order of their respective numbers, but it is there stated (p. 16) that "The errors now relied on are as follows," setting forth (pp. 16-28) fourteen statements or "Points" of alleged error, and claiming that the same are raised by certain assignments of error.

Then, under the "Discussion of Points of Law and Fact," defendant's brief rearranges said fourteen Points "under four general headings" with fourteen Points as

subdivisions of the four headings, and an extra Point, and under each subdivision or Point (pp. 28-31) claims that the respective Point is raised by certain assignments of error, but abandons some assignments previously claimed as bases for said Points.

Then defendant's brief, in its argument of said 14 Points (pp. 31-161), further abandons some assignments previously claimed as bases for said Points.

In order to reply specifically, "Point by Point," to defendant's brief, instead of disposing of the assignments of error in their respective order, we will in this brief for plaintiff follow the exact order of argument of defendant's brief; that is, we will take up, in their respective order, defendant's alleged fifteen points.

INSUFFICIENCY OF DEFENDANT'S EXCEPTIONS TO PROPERLY RAISE POINTS NOW RELIED ON BY DEFENDANT.

Plaintiff, however, before taking up defendant's fifteen different points in their respective order, insists that she should not be called upon to reply to many of defendant's "Points," because an examination of the Record herein conclusively shows that many of said Points were not in fact raised in the trial court, but made their first appearance in this case in defendant's brief in the Court of Appeals. We objected then, and we now respectfully but earnestly urge upon this Court that an objection which is made for the first time on appeal, or a general exception taken in the trial court and attempted to be turned into one or more specific exceptions in the appellate court when those specific exceptions were never called to the attention of, or passed upon, by the trial court, *should not be considered by an appellate Court, but should be disregarded.* The fact that the Court of Appeals of the District of

Columbia, in its opinion, decided some of the questions presented by defendant's Points, does not preclude this Honorable Court from taking cognizance of the fact that the Bill of Exceptions in this case does not support defendant's assumption that it has a right to argue points made for the first time on appeal. Defendant's brief in this court (p. 28) admits that plaintiff's brief in the Court of Appeals objected to that Court considering many of defendant's assignments and Points, for the reason that defendant's exceptions in the trial court were not sufficiently specific (for some points, no exceptions), to be later made the bases for assignments of error, and that a general assignment of error based on a very general exception should not be permitted to be transferred into specific objections made for the first time on appeal. It is submitted that the opinion of the Court of Appeals in this case presents no barrier preventing *this* Court from examining the Bill of Exceptions and deciding that many of defendant's Points should be disregarded by *this* Court for the reason that no proper foundation was laid in the Bill of Exceptions for said Points to be properly passed upon by *this* Court. Moreover, the Court of Appeals disregarded, in this respect, its own decisions:

It said, in *Norman v. U. S.*, 20 App. D. C., 494:

"The law is well settled, and the rule on the subject is peremptory that questions not raised in the trial court will not be considered in the appellate tribunal."

And in the case of *Walker Furn. Co. v. Dyson*, 32 App. D. C., 90:

The exception was: "on the ground that the same was contrary to law." This exception was clearly too general to avail the defendant here. He should have stated the specific grounds for his exceptions, and thereby given the trial court an opportunity to pass upon them. If parties are to be permitted to avail themselves of such general exceptions, it is apparent that a reversal of a case may be asked on grounds not suggested to or considered by the trial court."

The rule, that questions not fairly presented in the trial Court, or not supported by proper and sufficient exceptions in the trial Court, cannot be considered by an appellate Court, has been so often announced by this Court, that it is deemed unnecessary to cite the long list of the uniform decisions in that respect. See, however, *Fuller Co. v. McCloskey*, 228 U. S., 194; *McDermott v. Severe*, 202 U. S., 600, 610; *Hanna v. Mass*, 122 U. S., 24; *Chi. G. W. Ry. Co. v. LeValley*, 233 Fed., 384; *Jacobs v. So. Ry. Co.*, 241 U. S., 229.

COMMON CARRIER BY RAILROAD ARGUMENT IN REPLY TO DEFENDANT'S POINT "I (a)"

Defendant's brief states (p. 31) its first Point, I-a, to be:

"The application of the Federal Employers' Liability Law of 1908 to the case stated and to the case proved (Assignments 1, 2, 3, 4, 14) :

(a) The appellant as a matter of law can not be held to be a common carrier by railroad within the meaning of Section 1 of the Act of Congress of April 22, 1908 (Assignments 3, 4)."

INSUFFICIENCY OF 1ST, 2D, AND 14TH ASSIGN-
MENTS TO RAISE THE QUESTION OF
"RAILROAD."

Defendant's brief (p. 16) states that the "evidence shows the appellant company not to be 'a common carrier engaged in trade and commerce,' * * * within the meaning of the Federal Employers' Law of 1908," and then at the outset of the argument (p. 31) on said Point I (a), shifts from the contention as stated above to the additional proposition that the defendant company is not "a common carrier *by railroad*," and devotes its argument (pp. 31-54) to the attempt to uphold the second contention.

It will be noted that the words: "a common carrier engaged in trade and commerce" are taken from the First Federal Employers' Liability Act (1906), while the words: "a common carrier by railroad" are taken from the Second Federal Employers' Act (1908).

This change of position on the part of defendant is very ingenious, but unwarranted by the Record in this case; and we respectfully, but with all earnestness, call the attention of this Court to the fact that the contention as argued by defendant, namely, that defendant is not a "*railroad*" within the meaning of the Act of 1908, was URGED FOR THE FIRST TIME ON APPEAL. Its first appearance in this case was in defendant's brief in the Court of Appeals. The law of the case is, of course, the Act of 1908 and Amendment thereto of 1910, or the Act of 1906, but what we wish to forcibly bring to the attention of this Court is that defendant never made the objection in the trial Court that it is not a "railroad" within the meaning of the Act. Nowhere in the assignments or in the objections

and exceptions thereunder, wherein defendant claims to have raised the specific question, or in any other assignment, or at any place in the Record, can defendant show where it made the specific objection that it was not a "railroad;" the question was never raised in the trial Court so far as the Bill of Exceptions discloses. Moreover it may not be amiss to here state that, irrespective of the absence of anything in the printed Record properly laying the foundation to have this Court pass upon the question, as a matter of fact this silence of the printed Record is not due to any inadvertent failure of defendant to use specific language in preparing its Bill of Exceptions, or in filing its Assignments of Error, but is due to the fact that throughout all the course of the trial below the defendant failed to make, or in any way attempted to bring to the trial Court's attention, the precise and specific objection that it now makes in its brief.

It can not seriously be said that to contend that defendant is not "a common carrier engaged in trade and commerce" is the same as to contend that it is not "a common carrier by railroad," because under the first contention, if it should appear that defendant was a common carrier, no matter by what means (steam railroad, trolley suburban railroad, city electric (underground current) railroad, steamship, sailing vessel, ferry boat, automobile line, taxicab, etc., etc.), that would end the argument; but, under the second contention, it would have to be established that defendant in addition to being a common carrier, was also a "railroad" within the meaning of the Act of 1908.

To illustrate: If counsel for defendant had stated to the trial Justice the objection that defendant was not "a common carrier," and the trial Justice ruled that in his opinion it was because of the ruling in

Wash. Ry. Co. v. Downey, 40 App. D. C., 147; and Employers' Liability cases, 207 U. S., 497 (construing the Act of 1906); and defendant had then excepted to the Court's ruling without calling to the Court's attention the difference between the language of the Act of 1906 and that of 1908; that is, made the specific objection that defendant was not a "railroad," as it is now contending, it could not be said that defendant below made the specific objection that it is now making.

Let us examine the Record, in order that we may see that this Point was never raised in the trial Court or passed upon by the trial Judge, and should not now be considered.

The first, second and fourteenth assignments of error claimed (defendant's brief, p. 31) to raise Point 1 (a), are as follows:

"1. The Court erred in refusing to direct a verdict for the defendant at the conclusion of the plaintiff's evidence." (R., 13.)

"2. The Court erred in refusing to direct a verdict for the defendant at the conclusion of all the evidence." (R., 13.)

"14. The Court erred in refusing the defendant's Prayer No. 1." (R., 13.)

And said prayer was as follows:

"The jury is directed to return a verdict for the defendant." (R., 63.)

The first assignment may be quickly disposed of under the uniform practice of the Court of Appeals and other Federal courts, because "the first assignment of error based upon refusal of the motion to direct a ver-

dict for the defendant was waived by the defendant's introduction of evidence." Wash. U. Co. v. Wadley, 44 App. D. C., 176; West D. Co. v. Plummer, 44 App. D. C., 345, citing Main v. Aukam, 4 id., 51; Slye v. Guerdrum, 29 id., 551.

Further, that Point I (a) was never raised by this first assignment, or by the objections and exceptions thereunder, is conclusively established by an inspection of pages 41-2 of the Record, where the grounds of defendant's motion for a directed verdict at the close of plaintiff's case are stated, namely, non-negligence of appellant, assumption of risk by appellee's decedent, and decedent loosing his foothold. Those were the only grounds presented to the Court, and the Record itself certifies that "*These were the only specifications made by counsel for defendant in support of his motion.*" Not a word was said at that time by defendant's counsel, or by the Court, that referred even in the remotest degree to the Employers' Liability Act, much less any objection that appellant was not a "railroad." In view of that unqualified *contra* certificate of the Record, is it not absurd to contend that Point I (a) is raised by Assignment No. 1? It is a typical striking expose of the many unfounded-in-the-Record assertions of defendant's brief in its ingenious but futile attempt to have its contentions taken as assignments of error properly before this Court on specific exceptions of Record.

Moreover, we cannot leave unchallenged the misleading statement of this motion on page 12 of the opposing brief; to do so might perhaps allow it to be understood that defendant made the very general objection set forth in "(a)," and in addition made the specific objections stated in "(b)," "(c)" and "(d)," and thus perhaps allow it to argue that *in fact* it raised under its general objection "(a)" many other specific objec-

tions. In order to accurately state what occurred below, appellant's brief should insert the word "because," or "namely" between paragraphs (a) and (b), and then it would correctly read that "(b)," "(c)" and "(d)" were but specifications of "(a)," and the *only* specifications thereunder. Lest the impression be that we lay undue stress upon the vice of that misleading statement of page 12 of defendant's brief, in view of defendant's waiver of its motion by its introduction of evidence, it should be noted that defendant's motion for a directed verdict at the close of *all* the testimony (R., 60, defendant's brief p. 12-3) was but *a renewal of the prior motion* on the same grounds, and that the second assignment is based upon the refusal of this *renewal* motion.

Therefore, the first assignment should be disregarded by this Court because of the waiver, as stated above.

And the first, second, and fourteenth assignments should be disregarded, *in respect to Point I (a)*, because the objections and exceptions forming the bases of said assignments NEVER RAISED BELOW THE SPECIFIC OBJECTION NOW MADE ON APPEAL.

Defendant's brief (pp. 16-17) states that Point I (a) also "is raised upon the testimony" (R. 21, 52), as to whether appellant was a freight-carrier, but what we have just said answers that claim; and, further, since appellant has argued this testimony under its Point "I (b)," we will do likewise.

INSUFFICIENCY OF 3D AND 4TH ASSIGNMENTS TO RAISE THE QUESTION OF "RAILROAD."

The third and fourth assignments of error claimed (defendant's brief, p. 31) to raise Point I (a), are as follows:

"3. The Court erred in applying the Federal Employers' Liability Law to the case stated in the plaintiff's declaration.

4. The Court erred in applying the Federal Employers' Liability Law to the plaintiff's case under the evidence." (R., 13.)

We respectfully submit that these very *general* assignments cannot, by the mere fact of thus being assigned *after* trial, and by the mere claim in defendant's brief (p. 31) that they raise Point I (a), be metamorphosed into the *specific* objection set forth in said Point I (a). Can this Court, from the wording of those assignments, know whether defendant meant the Act of 1906, or the Act of 1908? If it meant that of 1906, then there is no foundation in the Record for its *now* objection predicated on the term "railroad" because that term was not in the language of the Act of 1906. Moreover, in respect to the 3rd assignment, which was expressly abandoned in defendant's brief in the Court of Appeals, it may be said that no demurrer was interposed by defendant to the declaration.

Even if the *general* objection, as incorporated into the 3rd and 4th assignments of error, had in fact been made below (which is contradicted by the Bill of Exceptions), it would not give defendant, under the rules and practice of the Federal Courts, the right to argue on appeal to the Court of Appeals, or on writ of error to this Court, the specific objection set forth in said Point I (a). In a given case, brought in the Supreme Court of the District, a score or more specific objections might be made as to why, under the evidence, the Employers' Liability Act did not apply to that case, e. g.:

That the case was barred by the limitation of the Act, as contended in this case;

That the claims are not sufficiently pleaded, or proven, as contended in this case;

Etc., etc. (Later in its brief defendant attempts to make *these same assignments* the bases of other objections on appeal.

If the accident happened in Maryland, and suit brought in the District of Columbia:

That defendant at no time engaged in interstate commerce, although engaged in intrastate commerce; and hence neither Act of 1906 nor 1908 applied;

That, although defendant was a common carrier engaged in interstate commerce, it was not a railroad; and hence neither Act applied;

That, although defendant was a "common carrier by railroad," doing an interstate business, the injured employee at time of injury was not engaged in interstate commerce; and, under this objection, as many more further specific objections might be urged, as there are activities in railroad work; and hence neither Act applied;

If the accident happened, and suit brought, in the District:

That defendant was a common carrier but was not a railroad; and hence only the Act of 1906 applied;

That defendant was either a common carrier, or a railroad, but did only local business, and injured employee was traveling on pass at time of accident and hence was not engaged in trade or commerce;

That injured person was not an employee, but a passenger.

That defendant was not a common carrier, nor a railroad, but was a manufacturer doing an interstate business;

Etc., etc.

Would not the uniform rules and practice of the Federal Courts and the District of Columbia Courts prohibit a defendant company from selecting at its option *after trial* any one of the above-stated objections, for instance, that defendant was not a "railroad," for argument on appeal, if it had not made that specific objection at trial, but had simply objected generally at trial that the Employers' Liability Act did not apply to the case, and then had simply designated as one of its assignments on appeal that the trial Court had "erred in applying the Federal Employers' Liability Law to the plaintiff's case under the evidence" (R. 13), as the defendant has done in the case at bar? But, in the case at bar, the objection to defendant being permitted to argue one of those specific objections, for instance, that it is not a "railroad" on appeal is much stronger than in the illustration given, because *in the case at bar the Bill of Exceptions* shows not even the very general objection (much less the specific objection) was ever made at trial.

That is the fatal defect in respect to the 3rd and 4th assignments, namely, that nowhere does the Bill of Exceptions disclose that defendant made even the *general* objections as formulated in those assignments. So far as the Record discloses, defendant first objected to the Employers' Liability Act being applied to this case after the verdict of the jury, when he came to file his Motion for a New Trial (R. 10), and later incorporated the same objections as assignments of error. The Bill

of Exceptions (R. 66-7), where defendant's counsel was arguing the prayers in the case, and citing the Vreeland case, 227 U. S., 59, indicates that defendant made no objection at that time to the Court applying the Employers' Liability Act to the case.

There is no place in the Bill of Exceptions wherein it can be shown that any contention was made below on the term "*railroad*" within the meaning of the Act; and the only reference in the entire Record showing that defendant made even the general objection that the Employers' Liability Act, not stating whether that of 1906 or 1908, did not apply to the case is to be found in its motion for a new trial (R. 10), which had no proper place in the Record on appeal, and which can not here be considered; first, because a motion for a new trial is not reviewable; and even defendant has abandoned its 22nd assignment of error (R. 14) based thereon; second, because the objection is general and does not specify the grounds thereof; third, because it was not made before the case was given to the jury; fourth, because an appellate court looks only to the Bill of Exceptions, and can not go outside thereof, in order to see whether a question was raised below.

In the recent case of *Chi. G. W. Ry. Co. v. LeValley*, decided by the Circuit Court of Appeals, in 233 Fed., 384, it appeared that, on the trial below, a written motion for a directed verdict on four specific grounds was filed at the close of the evidence, and a copy of it appeared in the printed transcript. There also appeared in the transcript a copy of the clerk's journal of the proceedings at the trial, which contained a recital that the-written motion was made "upon the grounds stated in said motion," that it was denied and that an exception was taken; but the bill of exceptions which recited the evidence at the trial contained no refer-

ence to the motion, the ruling thereon or the exception. The appellant court held that, as the grounds of the written motion, the written motion itself, the ruling thereon, and the exception thereto were not preserved by the bill of exceptions, they were not a part of the Record, and the ruling was not reviewable, saying:

"To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised * * * but the authentication of them by the signature of the judge is still required. * * *,"

and that the certificate of the clerk below that an exception to a ruling was taken did not make that exception "a part of the record in the case, so that an appellate court may review the ruling."

In the case at bar, in addition to the two *general* exceptions taken to the grantal or refusal of prayers (R. 66-7, 68-9, 73-4), the defendant can turn only to its exception to the overruling of its motion for a directed verdict at the close of all the testimony (R. 60), which will not avail it as it was a *renewal* motion of the motion for a directed verdict at the close of the plaintiff's testimony, and the *only* grounds of the first motion are specified (R. 41-2). If defendant intended to object on appeal that the Employers' Liability Act does not apply to this case, it was its duty to raise the objection in the trial Court and preserve the objection by a specific exception in the Bill of Exceptions, and further preserve by a specific exception, the specific ground of objection, that is, the objection now attempted to be asserted, that it was not a railroad within the meaning of the Act.

What we have said in respect to defendant's contention first made on appeal on the term "railroad,"

applies with equal force to its other contentions, also first made on appeal (hereinafter discussed), namely:

That appellant was not a freight carrier;

That there was no sufficient evidence to warrant the submission of the claim for conscious pain to the jury;

That the twice-amended declaration did not sufficiently plead the claim for conscious pain;

That its motion for a directed verdict at the close of all the evidence included an objection that the Act did not apply to the case; etc.

Insufficiency of 8th, 9th, 10th, 11th, 12th, 13th and 17th Assignments to Raise the Question of "Railroad."

Defendant's brief claims (p. 17) that Point 1 (a) also "is raised by the action of the Court in granting appellee's prayers Nos. 3 A, 4, 5, 6, 7, 8 (R. 60, 61 B, 66, 68, 73), based upon the Federal Employers' Liability Law, and the action of the court in refusing the defendant's prayer No. XII" (R. 65, 69, 73). This action of the Court is covered, respectively, by the 8th, 13th, and the 17th assignments of error. (R. 13.)

Again bearing in mind that the sole question hereunder this Point 1 (a) raises is whether or not defendant is a "railroad" within the meaning of the Act of 1908, we say that said objections, exceptions, and assignments are too general, and that the specific objection was never raised below.

We respectfully submit that defendant's contention based upon the term "railroad" within the meaning of the Act of 1908 was never fairly presented to the trial Court, as presented by proper exceptions, and should now be disregarded by this Court.

In order, however, to fairly and squarely meet the specific objection of defendant's Point I (a), we will show that, under the evidence and the authorities,

DEFENDANT IS A COMMON CARRIER BY RAILROAD

within the meaning of the Employers' Liability Act of 1908. Defendant's brief (pp. 31-54) cites and quotes from a number of State decisions. The cited State decisions, involving as they do the construction of their own State statutes, are, of course, guiding precedents for the respective State courts; but, in the case at bar, in construing the term "railroad," we have to do not with State statutes and State decisions thereon, but with the Federal Employers' Liability Act of 1908, and Amendment of 1910 thereto, in regard to which Federal statutes but one court, namely, this Court, can speak with all-controlling voice.

So that this Court may see the coloring, the manner in which the case at bar was tried below, we recite that previous to trial counsel for plaintiff noticed the difference in language between the Employers' Liability Act of 1906 and that of 1908, namely:

1906: "Every common carrier engaged in trade or commerce;"

1908: "Every common carrier by railroad;"

and searched the Federal authorities for rulings as to whether or not a suburban or interurban trolley railroad, such as defendant, was a "railroad" within the meaning of the Act of 1908. The decision of this Court in the Employers' Liability Cases, 207 U. S., 497, while it held that the Act was intended to include "TROLLEY

LINES" involved the Act of 1906, and did not construe the term "railroad." Likewise the case of Wash., etc., R. Co. v. Downey, 40 App. D. C., 147 (which was dismissed by this Court for want of jurisdiction in 236 U. S., 190), while ruling that the electric railroad in that case, and similar electric railroads, were "common carriers," did not, of course, construe the term "railroad" in the later Act.

The case of Omaha & Council Bluffs Street Ry. Co. v. Interstate Comm. Comm., 230 U. S., 324, was studied with great care. That case turned on the construction of the word "railroad" in the Interstate Commerce Act of 1887. Mr. Justice Lamar, in delivering the opinion of the Court, pointed out that "in 1887 that word had no fixed and accurate meaning," and that "the meaning of the word is to be determined by construing the statute as a whole;" and discussed the scope of the Act. The evidence there showed that the railroad was "doing a business only appropriate to a street railway." Mr. Justice Lamar reasoned that the Act of 1887 only "referred to railroads which were required to post their schedules, not at street corners where passengers board cars, but in 'every depot, station, or office where passengers or freight are received for transportation;'" and that the railway in question "laid its tracks in crowded thoroughfares of those cities and their suburbs, and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars and long trains through and along the streets;" and, "Only a few of its (Act of 1887) requirements are applicable to street railways, which did not do the business Congress had in contemplation, and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit;" and,

therefore, held that the railway in question was not a "railroad" within the meaning of the Act of 1887.

In the course of its opinion, however, the Court took occasion to say :

"But it is said that since 1887, when the act was passed, *a new type of interurban railroad has been developed*, which with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. *We are not dealing with such a case*, but with a company chartered as a street railroad, doing a street-railroad business and hauling no freight. The case was heard on demurrer, with the opinion of the Commission treated as part of the records. *It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear;*" (italics ours) :

having previously observed that :

"Applying this universally accepted rule of construing this word, it is to be noted that *ordinary railroads are constructed on the companies' own property;*"

and :

"Street railroads, on the other hand, are local, are laid in streets."

This decision of the Supreme Court (230 U. S. 324) was also reported in 46 L. R. A. (N. S.) published in 1913, where page 386 contains the following footnote:

"It would seem, though the point has not been directly adjudicated, that the Federal employers' liabilities acts are applicable to trolley roads. See *South Covington & C. Street R. Co. v. Finan*, 153 Ky., 155 S. W. 742, where the Federal employers' liability act of April 22, 1908, was held to govern a case where a motorman on a street car had been killed while making a trip from Newport, Kentucky, across the Ohio River, to Cincinnati."

Then there was the case of *McAdow v. Kansas City W. Ry. Co.*, 164 S. W. Rep. 188 (Kansas City, Mo., Ct. App., Mo. 2, 1914), in which the act under discussion was the Fed. E. L. A. of 1908 and which affirmed the judgment for plaintiff that had been rendered below. It was there said:

"Defendant further insists that, since the Metropolitan Company was a street railway, it was not a railroad within the meaning of that word as used in the Act of Congress. *An interurban trolley, or electric system of railway, running through more than one State carrying passengers or freight, or both, is undoubtedly engaged in interstate commerce within the meaning of the Act of Congress.* Now whether a street railway is a railroad in the ordinary acceptance of that term is an answer that has received opposing answers. * * * In *Omaha St. Ry. Co. v. Int. Comm. Comm.*, 230 U. S., 324, it was held that

it was not a railroad within the meaning of the Act of Congress. *But that case is so unlike this as to be of little service.* The facts which we have recited justify us in stating the question here to be this: IS AN ELECTRIC INTERURBAN RAILWAY LINE WHICH TRANSFERS ITS CARS, WITH PASSENGERS THEREIN, FROM ITS TRACK TO THE TRACK OF A STREET RAILWAY, AND THENCE TRANSPORTS THEM OVER THE LATTER TRACK FROM ONE STATE INTO ANOTHER STATE, DIVIDING THE FARE COLLECTED FOR THAT PART OF THE TRANSPORTATION COVERING THE STREET RAILWAY TRACKS, A RAILROAD ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE ACT OF CONGRESS? *IN OUR OPINION IT IS.*" (Italics and capitalization ours.)

Counsel also examined, previous to trial, the case of *Spokane & I. E. R. Co. v. U. S.*, 210 Fed., 243 (Cir. Ct. App., 9th Cir., Jan. 5, 1914), in which the syllabus said:

"The words 'used on street railways' employed in Safety Appliances Act, Congress, March 2, 1903, 32 Stat. 943, exempting such cars from the operation of the act; means those cars which at least are used on such railways in street railway tracks and do not include cars of an *interurban line* engaged in interstate commerce, even though they are run for a small portion of the distance over a street railway track to reach the terminal in the center of the city."

And the opinion contained the following language :

"In addition to its interurban lines, * * * which extend from Spokane to Coeur d'Alene, * * * the plaintiff in error owns the street railway system in Spokane, * * *. The interurban cars 'go out over the tracks of the company's street railroad system for a little over a mile,' and 'take the direct line to Coeur d'Alene, *which is on the company's private right of way.*'"

And the case of *Spokane & I. E. R. Co. v. Campbell*, 217 Fed. 518 (Oct. 19, 1914, Cir. Ct. App., 9th Cir.), brought under the Fed. E. L. A. and the Safety App. Act, was also examined. The syllabus, in part, is that the

"Safety Appliance Act (27 Stat. 531) requires common carriers engaged in interstate commerce *by railroad* to equip their 'locomotive engines' with power driving-wheel brakes, so that the 'engineer' may control the speed. * * * By Act March 2, 1903, 32 Stat. 943, such requirement was extended to all trains, locomotives, tenders, cars, and similar vehicles on any *railroad* engaged in interstate commerce. *Held*. That while the words 'locomotive engines' and 'engineer,' as used in the Act were primarily intended to refer to a steam-propelled engine, and to the operator thereof, respectively, such words were sufficiently broad to include an electric motor and the motor-man, and that the Act was therefore applicable to electric motors used to haul trains engaged in interstate commerce."

And the case of *South Cov. & Cin. St. Ry. Co. v. Finan's Adm.*, 153 Ky. 340 (decided Apr. 23, 1913), in which decedent was a motorman on an electric railway running from Newport, Ky., to Cincinnati, Ohio. At the trial the Judge instructed the jury under the Ohio statute, the defendant contending that the case was governed by the Federal Employers' Liability Act. On appeal, the case was reversed, the Appellate Court ruling that as "the Federal Act superseded the Ohio Statute, it necessarily controlled this case," thus holding that the defendant was "a common carrier *by railroad*."

And also the case of *South Cov. & Cin. Ry. Co. v. City of Covington*, 235 U. S., 350, in which this Court had described the same defendant mentioned in the preceding case, as follows:

"The testimony shows that the plaintiff is a Kentucky corporation, and its principal occupation is the carrying of passengers in connection with an Ohio corporation which operates on the other side of the Ohio River, upon continuous and connecting tracks, and across a bridge from Covington to Cincinnati. * * * This traffic is conducted by means of continuous trips and for single fare, between points on the lines of the railway in Covington and Fourth Street or Fountain Square in the city of Cincinnati to points in the city of Covington. * * * The cars operate without change of motormen or conductors, and under the direction of the same officers."

And held that, as the corporation was engaged in

interstate commerce, it was not subject to regulation of a municipal ordinance.

And, the case of *U. S. v. B. & O. S. W. R. R. Co.*, 226 U. S., 14, in which this Court said that "the line of the Traction Company is an 'interurban' electric railway for passengers and some freight." The quotation of the term "*interurban*" would indicate that the Supreme Court drew a distinction between the electric railroads of that type and the ordinary city street electric railroad.

Therefore, counsel for plaintiff (although being of opinion that the case would be tried in precisely the same manner under either the Act of 1906 or 1908 as amended) determined when the trial of the case at bar was reached, to introduce evidence showing conclusively that defendant is not merely of the "street railroad" type spoken of in the *Omaha & Council Bluffs S. Ry.* case, *supra*, but that it was something more, that it is one of the "*new type of interurban (trolley) railroad, constructed on the companies' own property,*" and not "*laid in streets,*" maintaining passenger stations, doing an interstate commerce business between the District of Columbia and the State of Maryland, and at times carrying freight in addition to passengers.

That it is, as was said in the *McAdow* case, *supra*, "*an electric system of railway, running through more than one State, carrying passengers or freight, or both; and an electric interurban railway line which transfers its cars, with passengers therein from its track to the track of a street railway,*" etc. And, as was said in the *Spokane* case, *supra*, it is "*an interurban line engaged in interstate commerce * * * run for a small portion of the distance over a street railway track,*" etc.

All this counsel had in mind, in addition, of course, to showing (if the *now* objection had *then* been made, at

trial) that such a railroad as defendant is clearly within the scope of the Act of 1908, in view of the Employers' Liability Cases, 207 U. S., 497, specifically stating that the Act was aimed at "trolley lines;" the Second Employers' Liability Cases, 223 U. S., 1, and the Downey case, *supra*; and the many Federal decisions showing the purpose of the Act to be to quicken the responsibility of carriers, and compel them to take proper precautions for the safety of their employees.

Carrying out the previously-determined intention of showing the real character of defendant to be a "railroad" within the meaning of the Act, counsel for plaintiff at the trial below formally introduced in evidence the following U. S. Statutes at Large (R. 33):

27 Stat. at Large 326;

28 Stat. at Large 492;

29 Stat. at Large 246;

31 Stat. at Large 270.

These were offered in evidence "as a matter of formality" to anticipate any possible objection, that, being private acts, the Court could not take judicial knowledge of them.

An examination of these statutes shows that: 27 Stat. at L., 326, July 29, 1892, is "An act to incorporate the Washington and Great Falls Electric Railway Company," and the said Company was therein authorized

"to locate, construct, equip, maintain, and operate a continuous line of single or double track railway, and all necessary sidings, stations, switches, turn-outs, and other devices, and to operate the same by electricity through and along the follow-

ing named streets, avenues, and roads, to wit: Beginning at a point, to be located by the Commissioners of the District of Columbia, west of the north end of the Aqueduct Bridge, and running thence west over the Canal Road * * * to Cabin John Creek."

The Act in one section, after referring to "so much of said railway as may be in the State of Maryland, gave said Company the right of eminent domain for its right of way, etc., in the District of Columbia.

Then 28 Stat. at L., 492, August 23, 1894, amending the prior Act, slightly changed the route but left the beginning the same, and also provided specifically how and where the said Company was to construct and maintain said passenger station.

And then 29 Stat. at L., 246, June 3, 1895, amended the two prior Acts, slightly changing the route of said railway, leaving, however, the beginning and terminus the same as previously provided as also the provisions in respect of the passenger station.

Then 31 Stat. at L., 270, June 5, 1900, was "An act relating to certain railway corporations owning or operating street railways in the District of Columbia;" and by section 1 provided that any one of eight therein-named District of Columbia railway corporations, including the Washington and Great Falls Electric Railway Company and the Metropolitan Railroad Company,

"may, under authority of this Act,"

and three therein-named Maryland railway corporations,

"may also, if not inconsistent with the laws of

Maryland, from time to time, if authorized by their respective boards of directors, enter into contracts with each other, or with any of the others, for the use of their respective roads, or routes, or any part thereof * * *. Provided, That in case any corporation enter into any such contract it is hereby *authorized to change its corporate name* to any other corporate name not then lawfully used by any existing corporation incorporated or organized in said District. *Such change may be made by a certificate* signed and acknowledged by a majority of the directors of such corporation and *filed with the recorder of deeds* for the District of Columbia."

Counsel for plaintiff also introduced in evidence (R. 31-32) a certificate filed February 1, 1902, in the office of the Recorder of Deeds, D. C., in Liber 9, fol. 452, of the Acts of Incorporation, showing that the Washington and Great Falls Electric Railway Company and the Metropolitan Railroad Company, on January 29, 1902, under the authority of the Act of June 5, 1900, *supra*, entered into a contract "for the reciprocal use of their roads or routes"; and that on February 1, 1902, the corporate name of the Washington and Great Falls Electric Railroad Company was changed to the "Washington Railway and Electric Company"; the present corporate name of defendant.

These four statutes and recorded certificate show, *contra* to the assertion in defendant's brief (p. 31), that defendant under its old corporate name, the Washington and Great Falls Electric Railway Company, "was chartered," as was said by the Court of Appeals (R. 75), "not as a street railway company, but as an electric trolley suburban and interurban railway company," running

entirely westwardly from 36th and Prospect streets, northwest, out to Cabin John Creek, Md. "It thus extended from the western edge of the city, through small suburbs and the country, possessed power of eminent domain to acquire right of way, and was required to maintain a passenger station at the point of beginning. Later, when it changed its name, a contract was made connecting its road with a street railway line extending eastwardly into and through the city." (R. 76.) In addition to the evidence of said statutes and certificate, the Record discloses an admission by defendant that its railroad is constructed on its own property:

"Mr. O'Donoghue: * * * You admit that you own the station. You will admit that instead of my having to bring the Recorder of Deeds up here?

"Mr. Barbour: I presume it is. It is on our right of way. * * *

"Mr. O'Donoghue: It is of record that they own the right of way and the land running from Prospect Avenue up to Glen Echo, and also the *railroad* station on 36th Street on the east side of 36th Street, between Prospect Avenue and N Street.

"Mr. Barbour: Yes." (R. 33-4.)

There is also the testimony of witness Whitney, called on behalf of appellant, on re-cross examination:

"Q. They own that right of way up there, the whole line, don't they?

A. I think so. (R. 56.)

That defendant was an interstate common carrier of passengers is shown by the undisputed testimony of nearly all the witnesses who testified in the case; and that it also carried some freight is shown by the testimony of witness Tarbell:

"Q. Do you know whether they haul freight on this line for people going up along there?

A. Yes." (R. 22.)

and witness Whitney:

"It hauls freight for the Glen Echo Park Company." (R., 56.)

And, in respect to the fact that defendant is not a city street railway, but is a suburban or interurban trolley *railroad*; that is, running not through crowded streets at a city rate of low speed with stops at intersecting street corners, but runs at a rapid rate of speed through sparsely settled open country, with stops at regular stations, we have the following testimony, in addition to the excerpts of testimony just hereinbefore quoted:

Witness Tarbell:

"The car was going between 25 and 30 miles an hour * * *; going about as fast as a railway train might go; a steam railway, an accommodation train, about 30 miles an hour." (R., 19.)

Witness Hardy:

"The car was going at a pretty good rate of

speed." (R., 22.) "The accident was just beyond McCoy Station," (R., 23.)

Witness Martz:

"The car was running very fast. * * * It was dark along there, there were no lights. * * * He hit a bank." (R., 25.)

Witness Perry:

"McCoy's Station, going west." (R., 26.)

"It was going between 18 and 20 miles, but there was nothing at all unusual about the speed of the car." (R., 27.) (Witness evidently meant that in the open country out of the city, at the place of the accident, it was not unusual for the car on that run to travel at that rate of speed. Does not this show the character of this railroad, and that its employees are entitled to the protection of the Employers' Liability Act as a check on the negligence of the master?)

Witness Whalen:

"McCoy's Station." (R., 30.)

"We flagged a car coming in back." (R., 32.)

Witness H. S. Gormley:

"McCoy's Station." (R., 35.)

"In the platform by the station." (R., 36, 55.)

"Ballasting * * * the track." (R., 55.)

Witness Birge:

"About a *mile out of* Washington." (R., 37.)

(Witness evidently meant out in the country a mile away from city streets.)

"The car was running at a high rate of speed. As fast, I think, as I have ever ridden. We were discussing that it was an exceedingly great rate of speed." (R., 38.)

Witness P. F. Gormley:

"McCoy's Station * * * poles are * * * right up to this *embankment*.

"There is a rock formation all through there. * * * and there is dirt; * * *. The total height (of the embankment) would be about 12 or 14 feet." (R., 41.)

Witness Wiser:

"Was in charge of the car as motorman; * * * taken my red light out of the back; * * * saw Scala's body; * * * it was in a little cut like and there was a little gully along in there * * * they were allowed to run 20 miles down there; * * * the *railroad ties*." (R., 50.)

"McCoy's Station from Georgetown (is) * * * about a mile, or probably a little more." (R., 51.)

Conclusive evidence of the open, unsettled character of the country through which defendant's railroad runs is presented by an inspection of the seven photographs taken at the scene of the accident, marked "Appellant's Exhibits" "T" (R., 60), "U" (R., 60), "V" (R., 60), "W" (R., 58), "X" (R., 52, 54); "Y" (R., 54) and "Z" (R., 58). Copies of these photographs are not reproduced in the Record, but it was stipulated (defendant's brief, p. 111) between counsel that the original

exhibits used below could be used on appeal, subject to consent of Court.

We respectfully request that this Court examine these seven photographs, under the contention of this Point I (a), in order to see the suburban, sparsely settled, character of the country, at the place of accident, evidencing defendant to be strictly a suburban, and not a city-street, railroad.

Having called to this Court's attention the evidence warranting a ruling that the defendant is a "railroad" within the meaning of the Act of 1908, we also wish to place before the mind of this Court a reproduction of the manner in which the case was tried below, because, while counsel for plaintiff anticipated, before trial, that perhaps defendant might at trial raise the question that it was not a "railroad," *as a matter of fact that question was never raised below*, or even ever discussed by either side. As no objection was made to the introduction in evidence of the four statutes and certificate mentioned above, counsel for plaintiff was not required to state their precise object, but did state that they were offered "with reference to the articles of incorporation and amending the incorporation of this Railroad Co.," and the Court replied: "It is not denied, as I understand it;" and counsel replied he "would rather have them formally offered in evidence * * * in order to comply with the Employers' Liability Act" (R. 33), and then following the admission on part of defendant (R. 33-4) which we have already quoted, but nowhere at that stage, or at any other stage, of the trial, was there any objection, or even the slightest comment on the term "*railroad*" (see pp. 22 to 55 hereof), but

THE OBJECTION APPEARED FOR THE FIRST
TIME IN THIS CASE IN DEFENDANT'S BRIEF
IN THE COURT OF APPEALS.

Since the verdict and judgment in the case at bar, the *McAdow* case, *supra*, decided in the Kansas City, Mo., Ct. App., came before this Court and was affirmed in 240 U. S., 51; Mr. Justice Holmes, in delivering the opinion, said:

"The original petition alleged that the defendant operated a line of electric railway extending from Leavenworth, Kansas, through Wolcott and Kansas City, in the same State, into Kansas City, Missouri; that the plaintiff was a motor-man upon a car on the line. * * *

"The errors assigned are, in substance * * * that the Act does not apply to electric roads. * * * The defendant road appears to be of the class of the Traction Company that was before the Court in *United States v. Baltimore & Ohio Southwestern R. R.*, 226 U. S., 14, and that was excluded from the decision in *Omaha & Council Bluffs Ry. v. Interstate Commerce Commission*, 230 U. S., 324, 337. Such roads have been held to be within the acts of Congress. *Spokane & I. E. R. R. v. Campbell*, 217 Fed. Rep. 518."

and also cited with approval the *Spokane, etc., Co. v. U. S.* case, 210 Fed., 243.

And then, on June 5, 1916, the last mentioned case was affirmed in 241 U. S. 344. It is to be noted that in this case the verdict and judgment were on fifteen charges, based on operating fifteen cars in violation of

the Safety Appliance Act, and that while twelve of the cars nearly approached the type used by steam-railroads, "the other three cars were large street cars which are regularly used only on the street railway tracks," and that Mr. Chief Justice White, in delivering the opinion of the Court, overruled the Company's contention that the Act did not apply to those three street-cars.

And then, on June 16, 1916, in 241 U. S. 497, this Court affirmed also the case of *Spokane & I. E. R. Co. v. Campbell*, 217 Fed., 518, *supra*, holding that the same Company as mentioned in the last cited case came under the Safety Appliance Act *in an action brought under the Federal Employers' Liability Act*. It will be noted that counsel for that Company evidently thought it of no avail to contend that their client was not a "railroad" under the Employers' Liability Act, as in all the courts they do not seem to have objected on that score, but made their objection that the Company did not come under the Safety Appliance Act.

We respectfully submit that, under the evidence, and the authorities, defendant is a "railroad" within the meaning of the Act of 1908; and further, that defendant's objection on this point may be disregarded for failure to raise the specific objection below.

ARGUMENTS IN REPLY TO DEFENDANT'S POINT I (b)

Defendant's brief states its second, or "I (b)," Point to be (p. 42-3):

"At the most that question," (whether or not defendant is a "railroad"), "was one of fact which should have been submitted to the jury and not

determined for the jury by peremptory instructions as was done by granting appellee's prayers Nos. 4, 5, 6, 7 and 8, all of which assumed as matter of law the appellant to be a common carrier by railroad within the meaning of the Federal Statute, and as such applied it to the case (Assignments 9, 10, 11, 12, 13)."

INSUFFICIENCY OF 9TH TO 13TH ASSIGNMENTS TO RAISE THE QUESTION OF "RAILROAD."

Plaintiff's prayers Nos. 4, 5, 6, 7 and 8 are set forth on pp. 61-63 of the Record, and defendant's exceptions thereto on pp. 66-67, 68, and Assignments cited on p. 13. It will be noted that only a very general exception was taken to the Court's charge (R. 73). It is respectfully submitted that said exceptions, and even said assignments, do not support defendant's claim that it made below at trial the precise objection it is now urging under its Point "I (b)," namely, the specific objection founded on the term "railroad." For authority in support of plaintiff's contention, that the exceptions being the foundations of assignments 9, 10, 11, 12 and 13, should be disregarded by this Court, so far as defendant's claim is concerned that they raised its Point "I (b)," see pp. 22-33 hereof. What was there said in respect to predicated a specific objection on appeal upon a general objection below, here applies with equal cogency; and further argument would be but repetition.

DUTY OF COURT TO APPLY THE ACT.

It would seem beyond question, were it not for defendant's brief, that it is the duty of a trial judge to rule whether or not the Employers' Liability Act applies to the case before him as disclosed by the evidence. Surely it is not the province of the jury to decide whether in their opinion the Act applies, or does not apply, to the case. Moreover, the Bill of Exceptions, (as has been heretofore said in this brief), fails to show that defendant in the trial Court made any objection to the trial Court instructing the jury as he did, *based on the ground that the Act did not apply to the case.*

QUESTION AS TO WHETHER DEFENDANT
"FREIGHT" CARRIER NOT RAISED ON
TRIAL.

From the excerpts of testimony in reference to "freight" set forth on pp. 16-17 of defendant's brief, and from its argument, pp. 31-54, it would seem that defendant would have this Court believe that the trial Justice held that defendant was "engaged in hauling freight," and therefore ruled that it was a common carrier by railroad within the meaning of the Act. On behalf of plaintiff, it is here stated with all emphasis that the trial Judge was never called upon by plaintiff, or by defendant, to so rule, and never *sua sponte* so ruled, and never even intimated, or expressed any opinion, or used any language, that in the slightest degree could be construed into even a reference to, or comment upon, the subject, or upon the testimony bearing thereon. And all the evidence as to "freight" is to be found in the testimony of the witness Tarbell (R. 22) and of witness Whitney (R. 55-6) set forth on

pp. 16-17 of the opposing brief; and this testimony was introduced without any comment, objection, exception, ruling or discussion whatsoever thereon at the time, or at any previous or later stage of trial, by either the trial Judge, or counsel on either side. The Bill of Exceptions is sufficient certificate for the foregoing statement. It is thought that this Court will not deem it necessary to pass upon whether or not it would have been error for the trial Judge to rule that defendant was a freight-carrier, when in fact the trial Judge never passed upon that specific question one way or the other. (See pp. 22 to 33 hereof.)

**NOT NECESSARY FOR DEFENDANT TO BE
"FREIGHT" CARRIER TO BE A "RAILROAD."**

The argument in defendant's brief (16-7, 31-54) seems to be directed to the contention that there was not sufficient evidence to justify a ruling that defendant was a freight-carrier, and therefore the trial Court erred in instructing the jury as to the law under the Employers' Liability Act. The fallacy of this misleading argument is seen at a glance to be in its false assumption that it was necessary for defendant to be "engaged in carrying freight" in order for the Act to apply, and also in falsely assuming that the Court passed upon the "freight" question. Defendant's argument is predicated on thus incorrectly presupposing that, before it could be held to be "a common carrier by railroad" within the meaning of the Act, it would have to be established by evidence that it carried freight. Such is not the law; the question for decision here under this Point "I (b)" is not whether, there being a conflict in the testimony on "carrying freight," the Court

should have left to the jury to decide that fact; but it is this question:

Is it essential that appellant be a freight-carrier, in order to hold that it is "a common carrier by railroad"?

If the correct answer to that question is in the negative, it necessarily follows that, even assuming that the trial Court did pass upon the question and erred in holding that defendant was "engaged in carrying freight," defendant was in nowise prejudiced by the assumed error; and, therefore, Point "I (b)" may be disregarded by this Court.

Plaintiff, it is true, introduced testimony (R. 22) to show that defendant was a freight-carrier, but such evidence is merely one circumstance tending to establish that defendant is "a common carrier by railroad," and is not the sole determinative test of whether it is a "railroad." See pages 34 to 51 hereof.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "II (a)"

THE CLAIM FOR CONSCIOUS PAIN AND SUFFERING.

Defendant's brief, p. 54, states its Point "II (a)" to be "that the action of the trial Court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering."

"because after all the evidence had been taken and all witnesses discharged, the Court allowed

the pleadings to be so amended as to introduce a new cause of action (Assignment 5)."

Plaintiff contends, in reply thereto, that the claim for conscious pain and suffering was not a new cause of action, because:

First, the original declaration sufficiently pointed to the claim for conscious pain and suffering in order to sustain a recovery therefor;

Second, the claim for conscious pain and suffering is not a "new cause of action, but merely an element of damages in addition to the element of damages for pecuniary loss to the beneficiaries, under the single action for both claims authorized by the Act."

FIRST.

The 3d and 4th counts of the declaration filed January 27, 1914, allege that plaintiff was "the duly appointed and qualified administratrix" (R. 5, 7), and there was no contradiction of her testimony on that point (R. 18); and all of the witnesses testified that the injury and death occurred on July 8, 1913.

The said third and fourth counts were both under the Employers' Liability Act, and both (R. 6-8), after allegations of the negligence of defendant, before any amendment was made, alleged that decedent

"was thereby knocked from said car violently and suddenly to the ground and his backbone or spine at or near the base thereof was thereby crushed and broken, and driven into his abdominal cavity, thereby causing immediate and pro-

fuse hemorrhages, in direct consequence whereof the said deceased died, on, to wit, the eighth day of July, 1913, **WITHIN ONE HOUR AFTER BEING HIT AND STRUCK AS AFORESAID;**" * * *.

Wherefore the plaintiff says that by reason of the premises and in accordance with the statuteS in such cases, the defendant is liable for an action of damages" for \$20,000.

The Act of 1906 provided that the carrier shall be liable "for all damages which may result from" its negligence. The Act of 1908 provided that the carrier shall be liable "*in damages to any person suffering injury.*" The Amendatory Act of 1910, in permitting damages for the suffering of a decedent to be recovered in the same action with the claim for pecuniary loss to the beneficiaries, likewise made use of the words: "*person suffering injury.*"

The third and fourth counts of the declaration in the case at bar, in alleging a claim under the Amendatory Act, went further than the words of the statute, "*suffering injury.*" and specified those *injuries* in the following description (R. 6, 7, 8):

"was thereby knocked from said car violently and suddenly to the ground and his backbone or spine at or near the base thereof was thereby crushed and broken, and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages;"

and then alleged that decedent's death occurred "within one hour after being struck as aforesaid;" and then, after this allegation of the damages to the "person suffering

injury," made the additional allegation of the pecuniary loss to the beneficiaries by reason of the wrongful death. If the declaration intended merely to assert a claim for the pecuniary loss to the beneficiaries by reason of the wrongful death, why did it also include a description therein of the injuries suffered by decedent, and allege the fact that he was still alive "within one hour after being hit and struck?" If it was asserting merely a claim for damages for the wrongful death, it was not necessary to include a specification of the injuries and that the employee did not die until within an hour thereafter. Those allegations, *in that case*, would have been wholly unnecessary—futile verbiage. All that would have been pertinent to say, after the statement of defendant's negligence, would have been that he was killed as a result of defendant's negligence, and the allegation of the pecuniary loss to the beneficiaries.

Surely, a person who sustains the severe injuries described above, and who does not die until within an hour afterward, suffers pain during the interim as a necessary accompaniment of those injuries. To state that a person is severely physically injured, and that he does not die until about an hour afterward, carries with it the allegation that in the period from injury to death he suffered pain. The original declaration in the case at bar, it is true, did not contain a distinct averment that the person was conscious between injury and death, but, on the other hand, *it did not allege* (as is usually the case in personal damage suits) *that in said period he was rendered unconscious*—not even for a moment—but averred that *he was struck and lived thereafter, an allegation which, in view of the injuries described, immediately and forcibly brings to the mind the realization of the indescribable pain he suffered before death*. Even defendant's brief in the Court of Ap-

peals, in referring to the language of the *original* declaration, conceded: "*Of course the description of this accident conveys the idea that the decedent suffered mortal hurt and AGONY.*"

To contend that the original declaration does not include therein a claim for "conscious pain and suffering," because there is no distinct averment therein in those exact words, is to deny the natural and intended effect of the language used, and to rely upon a technical objection based upon a narrow and restricted construction of the Act. We respectfully submit that to uphold a contention of that character would be in direct conflict to the spirit in which the Act should be construed by the Courts. This Court, in *St. L., I. M. & S. Co. v. Craft*, 237 U. S., 648, in construing the Amendatory Act of 1910, said:

**"IT SHOULD NOT BE NARROWLY OR
RESTRICTIVELY INTERPRETED."**

Further, defendant's contention that there is no distinct allegation of the claim for conscious pain and suffering, *totidem verbis*, in the original declaration, and its other contention—(made also to the twice amended declaration)—that the allegations of the injuries suffered by plaintiff's decedent are not "grammatically and logically" in the proper place in the declaration in order to constitute a "demand" therefor (pp. 91-2), are illiberal technical objections, and directly opposed to the decision of this Court in the case of *Baker v. Warner*, 231 U. S., 588. It was there said:

"There was, however, no distinct averment as to the meaning of those particular phrases in the publication on which the cause of action was

really based. * * * It is, however, unnecessary to discuss the sufficiency of the complaint, which, even if defective, was amendable. * * *

Courts liberally construe the pleadings, giving the plaintiff the benefit of every implication that can be drawn therefrom. SENTENCES AND PARAGRAPHS MAY BE TRANSPOSED. THE ALLEGATIONS IN ONE PART OF THE COMPLAINT MAY BE AIDED BY THOSE IN ANOTHER, AND IF TAKEN TOGETHER, THEY SHOW THE EXISTENCE OF FACTS CONSTITUTING A GOOD CAUSE OF ACTION. DEFECTIVELY SET FORTH OR IMPROPERLY ARRANGED, THE MOTION IN ARREST WILL BE DENIED. * * *

But those decisions (contra) announce what * * * was admitted to be a hard and technical rule—one which, we think, has been modified by modern and more liberal rules of pleading and practice *in the Federal Courts* and in most of those in the States.” (Italics and capitalization ours.)

It is respectfully submitted that the original declaration, without any amendment, sufficiently asserted or pointed to a claim for the pain and suffering of a “person suffering injury,” so that recovery therefor in the case at bar was not a new cause of action.

SECOND.

The claim for conscious pain and suffering of a decedent, and the claim for the pecuniary loss to his beneficiaries are not separate and distinct causes of action, but are separate and distinct elements of damages em-

braced in the one action; and only one action is authorized by the Act.

In addition to the fact that the original declaration, without any amendment, pointed to the claim for conscious pain and suffering so that it was not a new cause of action, that claim was not a new cause of action, because it was merely an element of the damages authorized by the Act to be recovered in a single action.

Defendant's brief (pp. 58-62, 93-4) cites and quotes from *Mich. Cent. R. Co. v. Vreeland*, 227 U. S. 59, and *St. L. I. M. & S. R. Co. v. Craft*, 237 U. S. 648, in the endeavor to support the proposition that the two claims are different, separate and distinct causes of action, or rather, that the claim for conscious pain and suffering in the instant case is a "new cause of action."

We have no contention to make to the correctness of defendant's quotations; in fact, we have incorporated parts of them in our 6th, 7th and 8th prayers (R. 62-3); but we do say that defendant has confused the question and misapplied those cases; that said two cases and three prayers all deal with a different subject from that under discussion—they are all directed *to the measure of damages of each claim*, which measure of damages is separate and distinct under each claim; that we are here dealing with another subject, namely, whether or not the two claims are separate and distinct causes of action, or are different elements of damages of the one cause of action.

In the *Vreeland* case, 227 U. S. 59 (reversing 189 Fed. 495, solely on the measure of damages), it must be borne in mind that the death occurred *before* the passage of the Amendatory Act of 1910, and, therefore, this Court took occasion to say (p. 65):

"This case, however, involves only a construction of the Act prior to the amendment referred to,"

and held that under the Act of 1908 the administrator could not recover for the before-death injuries of the decedent, and that the claim was confined to the pecuniary loss of the beneficiaries by reason of the wrongful death. The main question in the case was *the measure of damages for the latter claim*; and the Court, in holding that the administrator could not recover for the injuries of decedent before death, used the language quoted in defendant's brief, but in so doing it was pointing out the difference in two claims—that the measure of damages was independent in each claim. In saying:

"We think the Act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. * * *

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived," etc.,

the Court was pointing out that in the assessment of damages, the two claims were independent liabilities, as one is based upon the principle of the personal suffering and injuries of the decedent before death, and the other is based upon the principle solely of the pecuniary loss to the beneficiaries after death. Of course, from the viewpoint of damages, they are independent and distinct liabilities—death divides them. In using the terms: "Two distinct and independent liabilities," and "this cause of action is independent," in addition to

meaning the two claims have independent measures of damages, the Court was, of course, also referring to the fact that the claim for pecuniary loss to the beneficiaries was a statutory liability conferred by the Act of 1908, which made no provision for liability to an administrator on account of before-death injuries of his decedent.

But, nowhere in the Vreeland case can there be found any ruling or *dictum* inferring that, because the two claims are statutory liabilities under different Acts, and are to be assessed by the jury under separate and distinct measures of damages, that, therefore, they are separate and distinct causes of action *when they are joined together in a proper single action as authorized by the Act of 1910*. Under the Act of 1910 they are but elements of damages of the one cause of action.

But, in the Craft case, 237 U. S. 648, construing both Acts, this Court affirmed a judgment whereby an administrator recovered \$5,000 in damages for both claims, and said:

"And when this provision (Sec. 9) and Sec. 4 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as shall compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other."

It will be noted that the Court here treats of two claims, and states the measure of damages for each. In the opinion, up to the time of the quotation given

above, the Court discussed each claim separately, and in so doing, used the terms: "right of action for personal injuries," "cause of action, * * * liability for the pecuniary damages," "new and distinct right of action for the benefit of the dependent relatives;" and in speaking of the two actions given by the Act of 1908 (which can never exist together) said: "Two distinct rights of action;" *but, when it came to construe the Act of 1908 and 1910 together* (in the above quotation), it immediately changed its language to the term "the two *claims*," and so construed them, as "the two *claims*" to be recovered at the same time, in the same action, by the same plaintiff, for the benefit of the same beneficiaries, *and differing only in the measure of damages*. The conclusion suggests itself that, when the two independent rights of actions, each of which can be sued for without an assertion of the other (but never separately at the same time) are joined together in the same action, they are but "two claims" of that one action, each with a separate and distinct measure of damages. They are separate and distinct elements of damages, but together constitute but one action. Effect should be given to the precise and deliberate use of terms in Craft case.

The Court, after pointing out the difference in the two measures of damages, further said:

"A recovery upon both is not a double recovery for a single wrong, but a single recovery for a double wrong. * * * Much stress is laid upon the concluding clause in the new section,

'but in such cases there shall be only one recovery for the same injury.'

* * * We think this clause, as applied to cases like the present, is not intended to restrict

the personal representative to one right to the exclusion of the other, or to require that he make a choice between them, but to limit him to one recovery for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action.

* * * Had Congress intended that the personal representative should make an election between the two rights of action and sue upon one only, it is not easy to believe that it would have chosen the words in this clause to express that intention."

Here, we see that, when the Court was speaking of the two claims being asserted in separate suits, it immediately turned back to its former terms, "one *right of action* to the exclusion of the other," and "an election between the *two rights of action*." And the Court referred, with approval, to the case of *Northern P. R. Co. v. Maerkl*, 198 Fed. 1 (where a recovery was had upon both claims in one action), saying:

" 'The plain meaning' of the new section is that damages for the decedent's personal loss and suffering, and also for the pecuniary loss to the designated beneficiaries by the death, 'not only may be recovered by the personal representative in one action, but *must* be recovered in one action only, if at all.'

"So far as we are advised by the reported decisions, this is the view which has been taken by all the courts, Federal and State, that have had occasion to consider the question."

Thus we see that this Court has held: That "a recovery upon both is * * * but a single recovery upon a double wrong;" and that both claims, if asserted, "must be recovered in one action only." The Amendatory Act of 1910 makes both claims constitute, if asserted at the same time, one action embracing two claims; they cannot be maintained separately at the same time.

The Craft case was argued May 12, and decided June 1, 1915; and the case of St. L. I. M. & S. R. Co. v. Conarty, 238 U. S. 243, was submitted March 3, and decided June 14, 1915; and Kansas City S. R. Co. v. Leslie, 238 U. S. 599, was argued April 22, and decided June 21, 1915.

Counsel for the railroad company in the Craft case filed in the Conarty case a brief as *amici curiae* on behalf of the same company, contending vigorously that the two claims were separate and distinct causes of action, and, therefore, could not be maintained in the one action. And also, the attorneys for a different railroad company in the Leslie case filed in the Conarty case a brief as *amici curiae*, making the same contention.

This Court, when it came to render decision in the Conarty case, confined its opinion solely to the application of the Safety Appliance Act, and reversed the lower Court on the sole ground of error in applying that Act to the case.

But there is this very important connection between the three cases:

That Leslie case was decided by this Court on the authority of its ruling in the Craft case, the Court saying:

"It is said the Court below erred in approving the charge permitting recovery for pecuniary

loss to the widow and child, and also for conscious pain and suffering endured by deceased in the brief period—less than two hours—between injury and his death. This point having been considered, the right to recover for both these *reasons* * * * (the Court did not say “rights of action”) * * * in one suit was recently sustained. *St. L. I. M. & S. R. Co. v. Craft*, 237 U. S. 648.”

The Craft case *affirmed the ruling of the lower Court made in* — Ark. — (171 S. W. 1185), Dec. 7, 1914, and the State Court relied upon *its own* former decisions in the Conarty case, 106 Ark. 421, and the Leslie case, 112 Ark. 305, saying:

“It may be said in the first place that we have decided adversely to defendant’s contention in the case of * * * Conarty, * * * and in the case of Leslie * * *. We adhere to the decisions there given for the reasons stated in those opinions.”

Therefore, although this Court, in the Conarty case, did not touch upon the question here under discussion, it had approved of the language of the lower Court (106 Ark. 421) in that respect, because it affirmed 106 Ark. 421.

In that Conarty case below, 106 Ark. 421, the Court, in overruling the contention that the two claims were two separate and distinct causes of action, said:

“A motion was made below, treating the complaint as setting forth two causes of action, and

asking that plaintiff be required to elect which of them she would prosecute.

The Federal statute as originally enacted gave a cause of action, first, to the injured employee, which, of course, included **AS ELEMENTS OF DAMAGE** pain and suffering endured as well as pecuniary injury resulting from loss of earnings;

and next, to the widow and next of kin in the event of the death of such injured employee, the measure of damages being the pecuniary loss sustained by such widow and next of kin on account of such death. It was held that the cause of action given to the injured person did not survive his death, but died with him, and that a new cause of action then arose in favor of the personal representative for the benefit of the widow and next of kin. * * * The result was that, if the injured person died after bringing suit, his personal representative could not (be) substituted to bring the suit for the benefit of the widow and next of kin, but had to bring a new action for that purpose, and the pain and suffering endured by the injured person was not an *element of recoverable damages* sustained by the widow and next of kin and could not be recovered for their benefit. **TO CHANGE THIS CONDITION OF THE LAW**, Congress enacted the amendatory statute, approved April 5, 1910, * * *.

The statute as thus amended forbids the prosecution of more than one action and permits only one recovery; but the action is prosecuted, after the death of the injured person, for the benefit

of the widow and next of kin, and may include *compensation* for the pain and suffering endured by the injured person as well as for pecuniary loss of earnings and contributions; in other words, *compensation for all the damages* resulting from the injury for which the statute provides a remedy inures after the death of the injured person to the benefit of the widow and next of kin, but must be recovered in one action. In the present case no action had been instituted by the injured employee, and plaintiff prosecuted **ONLY ONE CAUSE OF ACTION** and seeks only *one recovery* **FOR THE VARIOUS ELEMENTS OF DAMAGES** *for which the statute authorizes a recovery of compensation.* There was, therefore, *nothing to call for an election between different causes of action.*" (Italics and capitalization ours.)

From the above quotation we see that, by the Amendatory Act, Congress has provided "*only one cause of action,*" "*which includes as elements of damage pain and suffering endured*" by the injured employee, and the "*pecuniary injury*" resulting to his beneficiaries on account of his wrongful death. The reasoning of this case would seem to be conclusive on the question.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "II (b)"

Defendant's brief, p. 68, states its Point "II (b)" to be "that the action of the trial Court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering."

"which was already barred by limitation of the statute which permitted the cause of action to survive (Assignments 5 and 21)."

Plaintiff replies:

First, that the defepdant waived the right to object to the amendments amplifying the previous averments of the declaration in respect to the claim for pain and suffering; and hence the amendments were not barred by the limitation of the Act.

Second, that the amendments of the declaration, in respect of the claim for pain and suffering, were merely in amplification of the previous averments of the declaration; and hence the amendments were not barred by the limitation of the Act.

FIRST.

The original declaration, as we have just seen, pp. 56-60 hereof, sufficiently "pointed" to a claim for conscious pain and suffering of plaintiff's decedent, and, therefore, the trial Justice did not err in permitting the declaration to be amended on October 20, 1915 (R. 8, 9, 17). Defendant's brief says very little about the amendment of October 20, 1917, *or the conditions and terms under which it was made*; its main complaint is directed to the amendment of October 29, 1917 (R. 8, 9, 68). It should be borne in mind, however, that the declaration was twice amended; the first amendment being made on October 20, 1915, which was *seven days before trial* commenced (R. 17), and nine days before the amendment on October 29, 1915. The opinion of the

Court of Appeals passed over the first amendment by saying:

"The fact that counsel for defendant seven days before the trial consented to the allowance of the amendment in no way waives his right to make the defense of limitations. The consent covered only the right to insert the amendment in the declaration, but did not waive defenses thereto" (R. 77).

But it is respectfully submitted that in so saying the Court of Appeals lost sight entirely of the effect of the waiver, and of the terms and conditions under which it was allowed, as certified by the Bill of Exceptions. The waiver of the defendant covered not only the right to insert the amendment in the declaration, but also waived the right to interpose the defense of limitation of the Act to the subject-matter of the amendment. The Bill of Exceptions certifies that:

"the above-entitled case being called for trial on the 20th day of October, 1915, and on that date and at that time the attorneys for the plaintiff and the attorney for the defendant being present in Court, and thereupon counsel for plaintiff asked leave of the Court to amend the fourth count of the declaration by inserting * * * the words: 'AND CAUSING HIM TO SUFFER INTENSE PAIN AND INJURIES,' and thereupon counsel for defendant stated to the Court that HE DID NOT OBJECT TO THE ALLOWANCE OF THE AMENDMENT; and thereupon the Court allowed said amendment, and the case was continued and set for trial the following week." (R. 17.)

There is a most misleading statement in defendant's brief, p. 12, in regard to this amendment, when it is said: "No new pleading was filed to this first amendment, and no opportunity to plead afforded so far as the record shows." Defendant did not request opportunity to plead to the amendment, but its counsel "stated that he did not object to the allowance of the amendment," and there was every opportunity open to defendant to file any additional plea within the seven days continuance which was granted it. It did not request any further time beyond the granted continuance. In view of the amendment, *at the instance of the defendant* "the case was continued and set for trial the following week."

The Record certifies that the case was "called for trial" on that 20th day of October, 1915, and the trial would have commenced on that day, notwithstanding the amendment then made, consisting of the insertion of the words "*and causing him to suffer intense pain and injuries,*" as the amendment was merely in amplification of the specifications of the injuries of the "person suffering injury" (words of the Act). But, at the request of counsel for defendant, and in consideration of his statement that "*he did not object to the allowance of the amendment,*" the Court continued the case and set it for trial the following week, and plaintiff, in view of defendant's waiver, did not object to the continuance. Surely it is not becoming for defendant's brief to *now* state (p. 12) that "no opportunity to plead" was afforded defendant, as though it was deprived in the trial Court of the opportunity to interpose any defense it wished to that first amendment. Counsel for plaintiff thought at the time, and it is thought that the trial Justice was also under the impression that defendant wished the week's continuance possibly for obtaining

witnesses on the question of existence, or lack, of pain and suffering of decedent, which pain and suffering was merely in amplification of the injuries of decedent originally averred in the declaration.

Then, when the case, pursuant to the continuance obtained by defendant was called for trial the following week, Oct. 27, 1915 (R. 17), defendant made no objection whatsoever to proceeding to trial, no request for further time to plead, or to demur, and the trial proceeded without defendant having filed any demurrer, or additional plea. If its present contention, that the claim for conscious pain and suffering, was barred by the limitation of the Act, is correct, why did it not object to proceeding with trial until it interposed a demurrer or plea to that claim? Its lack of objection at that time, and while hearing plaintiff's opening statement, and all throughout the evidence, is consistent with its waiver made seven days before trial. After the jury were sworn,

"counsel for the plaintiff made an opening statement to the jury on behalf of the plaintiff, part of which * * * was as follows: * * *.

We propose to show you, however, that he lived for some time, probably an hour after the accident, and *that he suffered intense pain and agony during that time.* * * * *He suffered intense pain and agony.* We will claim damages for that as well as for the wrongful death of the young man." (R. 17.)

There was not a word of objection made by defendant to that statement of what plaintiff's counsel intended to prove and claim damages therefor. It does not avail defendant's counsel to say, on Oct. 29, 1915 (R. 68),

after all the evidence was in, that he has a right to reply upon the pleadings, and that an opening statement is no part of the pleadings in a case, and hence he made no objection to that opening statement, because he was put upon ACTUAL notice then and there of the assertion of the claim by the opening statement of Oct. 27, 1915, and also the pleadings by the amendment of Oct. 20, 1915, had put him upon notice.

Plaintiff produced seven witnesses who testified in reference to the conscious pain and suffering of her decedent, and which testimony is set out in the Record (R. 22-32), and on pp. 83-7 of defendant's brief, and on pp. 97-104 hereof, and which testimony was unobjected to by defendant. It does not avail defendant to say that he was relying upon his right under the pleadings, because the amendment of Oct. 20, 1915, and the opening statement of plaintiff, put him on notice, and because *three* of those seven witnesses (Knowles, Burroughs, and O'Donnell) did not see the accident, and did not see decedent until about half an hour after the accident, and were produced on the stand for the sole purpose of testifying to his conscious pain and suffering at the time they saw him. Defendant cross-examined three of those seven witnesses, including two of the three, on the point whether decedent was "unconscious at that time" (R. 24), and "Q. He was unconscious from the time you first saw him?" (R. 32), and when it thus cross-examined, it waived, in addition to its former waiver of Record (R. 17), and was estopped from afterwards interposing any objection that the claim for conscious pain was barred by the limitation of the Act.

Then, at the close of all the evidence in the case, "the Court proceeded to pass upon the tendered Prayers" (R. 66), and when it had reached plaintiff's sixth prayer,

defendant made its first objection to the claim for conscious pain and suffering being submitted to the jury. And even then it did not make the objection that it now makes, but contended that *in no case* could there be a recovery for pain and suffering, because the Vreeland case had so decided (R. 66-7), and waited until the following morning (R. 68) when, *for the first time*, it made the objection that the claim for conscious pain and suffering was barred by the limitation of the Act.

We respectfully submit that, in view of its waiver of Record (p. 17), and its subsequent conduct during the giving of evidence, and thereafter, the defendant is now estopped from contending that the claim for conscious pain and suffering is barred by the limitation of the Act, and it must be held to have waived any objection in that respect.

THE AMENDMENTS MERELY AMPLIFIED THE PREVIOUS ALLEGATIONS.

Plaintiff contends that the amendments of the declaration in respect to the claim for pain and suffering were merely in amplification of the previous averments of the declaration; and hence the amendments were not barred by the limitation of the Act.

Even if it should be held by this Court that defendant's waiver of objection (R. 17) to the allowance of the amendment of October 20, 1915, did not prevent it from later objecting to the claim for pain and suffering on the ground that the claim was barred by limitation of the Act, then it is respectfully submitted that the amendment of October 20, 1915, (R. 8, 9, 17), was merely in amplification or expansion of the original allegations of the unamended declaration, and that the second amendment, October 29, 1915 (R. 8, 9, 68) was

merely in amplification or extension of the averments of declaration as previously amended on said October 20, 1915, and that, therefore, both said amendments were not barred by the limitation of the Act as in point of time they related back to the date of filing of the original declaration.

The fact that the amendment of October 29, 1915, was not made until after the evidence was closed, is answered by the provisions of Section 399 of the D. C. Code, namely :

*SEC. 399. IN ALL JUDICIAL PROCEEDINGS THE COURT, JUSTICE OR JUDGE, IN WHICH, OR BEFORE WHOM, THE CAUSE SHALL BE PENDING SHALL HAVE POWER UPON SUCH TERMS AS SHALL SEEM BEST, AT ANY STAGE OF THE CASE, TO ALLOW AMENDMENTS OF WRITS, PLEADINGS * * *.*

Even if, by failure to include in the original declaration a distinct averment of conscious pain, the claim for conscious pain and suffering was not therein *technically* sufficiently pleaded, the original declaration sufficiently at least "pointed" to such claim so as to permit the imperfection to be cured by amendment *and verdict*, and the amendment, owing to the basis of the claim in the original declaration would not be barred by the limitation of the Act as it would relate back to the commencement of the suit by the original declaration.

In the case of *Seaboard Air Line v. Renn*, 241 U. S., 290, under the Employers' Liability Act, this Court said :

"The original complaint was exceedingly brief and did not sufficiently allege that at the time

of the injury the defendant was engaged and the plaintiff was employed in interstate commerce. *During the trial* the defendant sought some advantage from this and the Court, over the defendant's objection, permitted the complaint to be amended so as to state distinctly the defendant's engagements and the plaintiff's employment in such commerce. * * *

The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that the amendment of the complaint would constitute a new cause of action under that Act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made a medium of introducing this new cause of action consistently with §6 that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' * * *

If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. * * *

In these circumstances, while the trouble is not free from difficulty, we can not say that the Court erred in treating the original complaint as pointing, although imperfectly, to a cause of action under the laws of Congress. And this being so, it must be taken that the amendment merely extended or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was filed before the limitation had expired."

Defendant's brief (pp. 63-5, 96, 155), in citing and quoting from the case of *Garrett v. L. & N. R. Co.*, 235 U. S., 308, affirming 197 Fed., 715, has evidently entirely overlooked the reason for the necessity of the amendment. The death in that case happened before the amendment of 1910, and involved only the unamended Act of 1908, and hence only a recovery for pecuniary loss to decedent's parents could be maintained. The declaration did not allege the parents suffered any such loss. When the case was before the Circuit Court of Appeals, that Court said:

"As to the necessity for amendment, it is to be observed, as set out in the statement, that plaintiff simply sues for the benefit of decedent's parents in the first and second counts, and as administrator in the third count. He does not allege anywhere in the declaration that the parents of the deceased suffered any loss or injury through his death. * * *

It may be conceded, for present purposes, that if a widow and children had survived, and the action were maintained for their benefit, the law would presume substantial damages, *and so dispense with necessity* of specific averment in that behalf."

In other words, the necessity for specific averment was because parents do not in every case of the wrongful death of an adult son suffer pecuniary loss; in many instances an adult son contributes nothing to the support or maintenance of his parents. But the Circuit Court of Appeals did say, that in the case of a widow and children surviving, "the law would presume substantial damage, AND SO DISPENSE WITH NECESSITY

OF SPECIFIC AVERMENT." And, so in the case at bar, the declaration alleging severe physical injuries and that the employee lived thereafter, the law would presume he suffered pain in the period from injury to death, and would "dispense with necessity of specific averment." To the contention that the law could not presume he was conscious during that interim, the answer can be made that, if it was necessary to allege consciousness, then it could be brought in by the way of amendment. Both lower Courts offered to plaintiff in the Garrett case the opportunity to amend by inserting a specific averment of pecuniary loss to the parents. The plaintiff in the Garrett case *declined to amend*, and, there being no distinct averment of pecuniary loss to the parents or allegations that he had ever contributed to their support or maintenance, the trial Court ruled there was no claim sufficiently pleaded which could be submitted to the jury, and this ruling was upheld by the Circuit Ct. App. after that Appellate Court had also offered to plaintiff the opportunity to amend. This Court adopted the line of reasoning of the two lower Courts, and said:

"Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof.

* * *

The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss was in fact suffered. Common experience teaches that financial damage to a parent

by no means follows as a necessary consequence upon the death of an adult son.

The plaintiff expressly declined in both courts below to amend his declaration so as to allege pecuniary loss to the parents; and judgment properly went against him."

How different from the case at bar, where the declaration without amendment specified decedent's injuries *and alleged he lived thereafter*, and where the declaration was amended seven days before trial, so that it averred those injuries caused decedent "TO SUFFER INTENSE PAIN" (R. 8, 9, 17), and where at the close of the evidence plaintiff immediately adopted the suggestion of the Court (R. 8, 9, 68), and further amended, and we have the opposite party contending against the right of amendment. Another difference is that in the case at bar the original declaration, and especially as first amended seven days before trial, did "set out facts or circumstances adequate to apprise the defendant with reasonable particularity" that a claim was being asserted for a "person suffering injury," and also the opening statement of plaintiff (R. 17) apprised defendant of the claim, and defendant made its *first objection to that claim* during the argument on prayers (R. 66-8), *after* the evidence supporting the claim had been admitted without objection, and defendant had cross-examined witnesses in respect thereto (R. 24, 28, 32). In the Garrett case defendant objected to the admission of the evidence, and it was excluded.

In *Ill. Surety Co. v. Peeler*, 240 U. S. 214, it was said:

"In respect to the amendment of the complaint, it is apparent that * * * there was an existing right of action under the statute at the

time the suit was brought. * * * The Court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations, and in this there was no error."

In the case of *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, the plaintiff, "in her individual capacity, commenced this action * * * to recover damages by reason of the death of her son," under the State statute; and later filed an amended declaration as administratrix setting up the Federal Statute. The defendant "excepted to that portion seeking to make her a party as administratrix, because the amendment making her a party in that capacity was made more than two years from the time the alleged cause of action accrued; and for that the cause of action, if any, was barred by the limitation of two years." The trial Court overruled the demurrer, and there was a judgment in favor of the plaintiff, which was affirmed by the Cir. Ct. App. This Court, in affirming the Cir. Ct. of App., said:

"It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. * * * The pleader was not required to refer to the Federal act, and the reference to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.
* * *

Nor do we think it (the amendment) was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation. * * * It introduced no new or different cause of action, nor did it set up any different

state of facts as the ground of action, and therefore *it related back to the beginning of the suit.*

* * * Judgment affirmed."

The pertinency of the above decision on the question under discussion lies in the fact that the Wulf case, *supra*, and all the Federal authorities prior thereto (and since), are uniform in holding that an action under the Employers' Liability Act can be maintained only by a "personal representative," and not by the next of kin in an individual capacity; and that the averment of "personal representative" capacity is an essential allegation. Surely, the facts in the Wulf case were stronger in favor of the amendment therein being held "a new cause of action" than the facts in the case at bar. In the Wulf case, since the original declaration specifically stated that the plaintiff "in her individual capacity, commenced this action," under the State statute, there could be (in the language of the Garrett case, *supra*), no "facts or circumstances adequate to apprise the defendant" that a claim was being asserted *by an administrator* under the Federal Act, and yet this Court held that the amendment did not constitute a new cause of action barred by the limitation of the Act. In the case at bar, the original declaration specified the injuries sustained by decedent, and that he lived thereafter, *but did not contain a specific averment contrary to the implication that he was conscious* between injury and death (and consciousness would not have been inconsistent with the facts alleged); on the other hand, the original Wulf declaration contained a specific averment that the plaintiff was bringing the suit in her individual, and not in her representative capacity, thus expressly denying the existence of the essential fact. Compare the two cases;

Representative capacity essential to maintain the action, and its existence *denied* in the Wulf declaration;

Consciousness an essential fact, and its existence not denied, and facts alleged not inconsistent with, but implying its existence, in the Scala declaration.

It can not be said, in view of the decision in the Wulf case, that the amendment in the Scala case constitutes a new cause of action barred by the limitation of the Act.

Pages 70-74 of defendant's brief consist mainly of quotations from the case of Whalen v. Gordon, 95 Fed. 305, which quotes from and relies on Union P. R. Co. v. Wyler, 158 U. S. 285. Both of those two cases may be disposed of by bearing in mind that the Wulf case, which we have just discussed at length, refers to the Wyler case in the following language:

"Reliance is placed by defendant in error, upon Union P. R. Co. v. Wyler, 158 U. S. 285. * * *

Since, in the present case, the Federal statute did not need to be pleaded, and the amended petition set up no new facts as the ground of action, *the decision in the Wyler case is not controlling.*"

In the case of Neubeck v. Lynch, 37 App. D. C. 576, the statute involved was sections 1301-03 of the D. C. Code (Lord Campbell's Act), and it was said:

"It is conceded that the defect was cured by the amendment, but, as the amendment was not filed within the one year allowed for the bringing of the action, it came too late. Therefore,

the sole question presented is whether the amendment stated a new cause of action. *If the amendment simply related back to and cured the cause of action defectively stated in the original declaration, the bar of the statute can not be invoked as a defense.*

* * * The averment is essential, together with the other allegations of the petition, to state a proper cause of action.

Its omission merely results in stating a defective cause of action, which may be cured by an amendment, which will relate back in point of time to the filing of the original declaration."

Also see *Tyssowski v. Smith*, 35 App. D. C., 403, saying:

"Objection was made for the first time at the trial term that the second count does not contain a sufficient averment as to damages. * * * Whether it was subject to the objection urged at the trial Court, we do not stop to inquire, for the reason that the plaintiffs, in the circumstances, should have been permitted to amend, if they were so advised."

And, *Stevens v. Saunders*, 34 App., 321, saying:

"We will first consider the assignment of error directed to the action of the Court in allowing recovery under the third or amended count of the declaration, this count, as previously stated, having been filed more than a year after the death of the plaintiff's intestate. If * * * *it is but an elaboration of matters stated in the second count there was no error.* * * *

In both counts the right of recovery is based upon the failure of the defendant to provide a safe place in which to work. * * * The purpose of the statute is to give the defendant early notice that damages are to be sought from him, and the nature and scope of the claim. Such being the object of the statute, *the plaintiff's right of recovery ought not to be defeated by a too technical construction of an amended declaration.*"

Defendant's brief, pp. 65-7, 77, 95, seems to attach great importance to the case of *Hurst v. Detroit C. R.*, 84 Mich., 539, but an examination of that case discloses that defendant has misconceived the facts and the reasoning of the Court's ruling therein. That case involved the construction of two different sections of the Michigan Code, two different statutes not related to each other. In the case at bar the Act of 1910 was enacted as an amendment of the Act of 1908, and both claims are recoverable thereunder. In the Michigan case the declaration was drawn under *one* State statute, claiming damages for the pecuniary loss to the decedent's parents. Plaintiff shortly before trial was permitted to amend, but, in obtaining the consent of the Court to the amendment, the plaintiff specifically stated the amendment was not for the purpose of bringing into the case a claim for decedent's injuries, but that the claim was confined to the pecuniary loss to decedent's parents. Then at trial, as defendant's brief states (p. 66), "there was no evidence introduced by the plaintiff tending to show any pecuniary loss on the part of the parents, and no evidence was offered on the part of defendant on that score. The defendant's counsel requested the court to charge the jury that

under the pleadings *and proof* the plaintiff could not recover." The plaintiff then requested the Court "to be permitted to amend his declaration so as to include a claim for damages," under *another* State statute, for the before-death injuries of decedent. The Court refused to allow the declaration to be so amended, and this ruling was affirmed on appeal. *The reasoning* of both the trial Court, and of the appellate Court, in refusing the second amendment, was because the two claims could not be joined together under the two Michigan statutes, but had to be brought in separate actions, and because in obtaining the first amendment plaintiff had stated his case was under the statute permitting recovery for pecuniary loss to the parents and that he was not asserting any claim under the statute for injuries to decedent. The law (State statutes), the facts, and the line of reasoning in the Michigan case are quite different from those in the case at bar, where the Federal statute provides that if both claims are asserted they must be recovered *in the one action* or not at all, and where both the first amendment made before trial and the second amendment at trial (R. 8, 9, 17, 68) were in respect to the same claim—for the injuries to decedent.

It is respectfully submitted that in the case at bar since the amendment (as was said in the Renn case, *supra*) "merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time.

Further, defendant's brief erroneously assumes that there are two different statutes of limitations for the Act, one commencing on the date of injury to decedent, and the other beginning on the date of death of decedent. Both injury and death, however, in the instant case occurred on the same day.

It is submitted that the statute begins to run from the date of appointment of an administrator because it is not until then is there any person in existence authorized under the Act to commence the action, in case of death, for both the claim for pecuniary loss to the beneficiaries and the injuries to decedent. In the case of *Amer. R. Co. v. Caronas*, 230 Fed., 545, under the Employers' Liability Act, decided by the Circuit Court of Appeals for the First Circuit, the employee was injured November 30, 1908, and died December 8, 1908, and an administrator was not appointed until May 12, 1914, nearly six years after the date of death, and suit was brought by the administrator on December 17, 1914. In affirming the judgment for plaintiff, the Court said:

"The case is here on defendant's bill of exceptions, and the errors assigned are: (1) To the overruling of a demurrer to the declaration setting forth that the action was barred, in that it was not brought within the two years' limitation of section 6 of the Act. * * *

The substantial question in the case is raised by the first assignment of error. The defendant says that the action cannot be maintained for the reason that it was not brought within two years from the death. The plaintiff's contention is that the limitation provided for in the statute does not run from the death, but from the appointment of the administrator. Section 6 provides:

"That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

And the question is whether the action accrued so that the statute began to run from the death or from the appointment of the administrator, when

there was some one in existence who could enforce the liability. * * *

The declaration discloses that the plaintiff was appointed administrator within two years prior to bringing suit, but fails to show that he brought his action within two years from the death. * * *

In view of the well-recognized rule heretofore pointed out as to when a right of action accrues—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation ran from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not begin, so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

In view of this decision of the Circuit Court of Appeals, it would seem that in the case at bar the period of limitation did not commence to run against the claim for pecuniary loss to the beneficiaries until the appointment of plaintiff as administratrix of decedent. The contention might be made that it did commence to run against the claim for the before-death injuries from the date of injury, and it is such a situation that appellant's brief presupposes in arguing that the two claims are separate and distinct causes of action. Its argument is based on that erroneous assumption. The correct solution is, that as Congress in the Act of 1908 provided that the limitation should commence from the date

of the appointment of the personal representative, and re-enacted that provision in exact words in the Amending Act of 1910, there is but one period of limitation for both claims of the one action, namely, within two years from the appointment of the personal representative. To hold otherwise would indeed present an anomalous condition; that Congress has specifically provided for the bringing of both claims in the one suit, by the same plaintiff, against the same defendant, for the benefit of the same beneficiaries, but that the statute of limitations begins to run at different times against that one action.

In the case at bar the trial Court was not called upon to pass upon whether or not the statute commenced to run from the date of death or from the date of plaintiff's appointment as administratrix. His ruling in allowing the amendment of October 29, 1915, was that *the original* declaration, and as amended on October 20, 1915, somewhat "pointed" to the claim for conscious pain and suffering, so that the amendment of October 29, 1915, was not a new cause of action, but was merely in amplification or extension of the allegations in support of that claim, and, therefore, related back and was not barred by the statute of limitations; and further, that defendant had not objected to the amendment of October 20, 1915 (R. 17), reading: "And causing him to suffer intense pain and injuries," which was an allegation tending to support a claim under the Act, and defendant had not objected to the admission of evidence in support of that claim, but had even cross-examined in respect thereto.

It is respectfully submitted that in the case at bar the claim for conscious pain and suffering of plaintiff's decedent was not barred by the limitation of the Act.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "II (C)."

Defendant's brief (pp. 54, 83) states its fifth, or "II (c)," Point to be that "the action of the trial Court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering" because

"There was not sufficient evidence before the jury to warrant a recovery therefor even if properly pleaded (Assignments 11, 13 and 19)."

Insufficiency of Exceptions to Raise question on Appeal of lack of evidence on claim for pain and suffering.

Before replying to defendant's stated contention, plaintiff respectfully calls attention to the fact that there is no valid foundation in the Bill of Exceptions properly permitting defendant to urge this question on appeal.

It claims (its brief, p. 83) that the question is raised by its 11th, 13th and 19th assignments of error.

The 11th and 13th assignments, respectively, are very general, namely:

"11. The Court erred in granting the plaintiff's prayer No. 6.

"13. The Court erred in granting the plaintiff's prayer No. 8." (R. 13.)

An inspection of said prayers shows that plaintiff's sixth prayer (R. 62) as later made part of the Court's charge (R. 71), correctly instructed the jury that, if they found for the plaintiff, the damages were to be

assessed both for the claim for pecuniary loss to decedent's beneficiaries and for the claim for conscious pain and suffering of decedent; and plaintiff's eighth prayer (R. 62), as later made part of the Court's charge (R. 72), correctly instructed the jury as to the measure of damages on the claim for conscious pain and suffering of decedent.

And the 19th assignment of error is that: "The Court erred in refusing defendant's prayer X" (R. 43), which was on the measure of damage for pecuniary loss to decedent's parents, and erroneously limited the recovery to that claim, excluding any recovery for the injuries to decedent (R. 66).

The only exceptions noted by defendant to the granting of plaintiff's said two prayers and refusal of defendant's said prayer, and to the Court's charge, are to be found in the Bill of Exceptions at pp. 66-7-8-9, 73-7, of the Record. An inspection of those exceptions, and of the entire Bill of Exceptions, shows that defendant never made in the trial Court the objection that it is now attempting to urge on the score of the alleged deficiency of the evidence to support a recovery for conscious pain and suffering. Its objections and exceptions to the Court's charge are, indeed, so general that they should not be considered in an appellate court for any purpose whatsoever.

It is respectfully submitted that, from the objections and exceptions appearing in the Bill of Exceptions in respect to the above-cited three prayers, it would have been impossible for the trial Justice to have understood the defendant was making any objection on the score of alleged insufficiency of evidence to sustain the claim for conscious pain and suffering, or any objection except that based on the claim being barred by limitation of the Act as a new cause of action (R. 68). In fact,

we ask, with deference, could this Court, from a reading of said prayers and an inspection of the Bill of Exceptions, or even from the assignments of errors based thereon, understand that defendant intended to make in an appellate Court the objection that it raises in its brief under this Point "II (c)"? Defendant has already in its Points "I (a)" and "I (b)" claimed that its exceptions in respect to said two plaintiff's prayers raised the question of "railroad." If any objection on the score of alleged lack of evidence on the claim for conscious pain and suffering (which defendant may have had in mind at the time of noting those general exceptions), can be preserved for review by an appellate court by the presentation of the Bill of Exceptions in the case at bar, it might as well have argued also that the same prayers and exceptions thereunder also preserved for review by an appellate court the question of deficiency of evidence on the claim for pecuniary loss to the beneficiaries (see pp. 20-33 hereof).

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CLAIM FOR PAIN AND SUFFERING.

That, however, the evidence was sufficient on the question of the conscious pain and suffering of appellee's decedent is conclusively shown by a comparison of the evidence in the instant case with that in the Craft case.

In *St. L. I. M. & S. R. Co. v. Craft*, — Ark. —; 171 S. W. 1185 (see 108-10 hereof), the same contention was made, but was overruled in the opinion affirming a recovery for the conscious pain and suffering of the injured employee in the period between injury and death. That Court said:

"Plaintiff's decedent, while a brakeman,

* * * was run over in the night time by a coal car. He lived something over thirty minutes and suffered great agony. * * * It is, however, earnestly insisted by counsel for the defendant that there is no evidence which would warrant a verdict against it for pain and suffering. We do not agree with them in that contention. The deceased was run over, in the night time, by a coal car of the defendant and was found lying face downward between the rails. * * * The car had pinned his body down between the rails and it was first necessary to raise it off his body. Decedent could not even then be removed from under the car until it had been pushed forward several feet. All this required about fifteen minutes' time and fifteen minutes more elapsed before the ambulance arrived and decedent was then sent to the hospital. At what time he died is not certain, but it is certain that he was alive when they started to the hospital and that this was a period of thirty minutes after he had been struck off the car. His body was badly mangled and his intestines lacerated and very much swollen. All the witnesses say that he was groaning during all the time they were trying to remove his body from under the car and until he was carried away in the ambulance. One of the witnesses stated that when he took hold of the decedent and tried to remove him from under the car the decedent would move his arms and also tried to move his body. His companions spoke to him but he did not answer them.

Under the circumstances we are of the opinion that the jury were warranted in finding that the decedent suffered conscious pain. IT IS TRUE

HE NEVER SPOKE TO HIS COMPANIONS, but it must be remembered that while he was under the car and during the time they were trying to speak to him he was lying face downward, one wheel of the car resting on his body. One of his companions tried to raise him up and he moved his arm and tried to move his body. *We think the jury were warranted in inferring from these facts that he was conscious* and was doing all in his power to assist his companions in getting him out from under the car. * * *. His suffering was doubtless increased because he could not know how long it would be before * * * surgical relief could be provided for him. *Each additional minute of delay under the circumstances added to the horrors of his situation:* AND HE MUST HAVE SUFFERED ALMOST INDESCRIBABLE AGONY OF MIND AND BODY. His body was mangled and his intestines were lacerated and swollen. IT IS EVIDENT THAT HE SUFFERED INDESCRIBABLE ANGUISH, AND WE ARE OF THE OPINION THAT THE JURY WERE WARRANTED IN FINDING THAT HE CONTINUED TO SUFFER SUCH ANGUISH, AT LEAST UNTIL HE HAD BEEN CONVEYED A PART OF THE WAY TO THE HOSPITAL. Thus it will be seen that his suffering continued for more than thirty minutes." (Italics and capitalization ours.)

Does not this description of the injuries and suffering in the Craft case sound as though we were listening to the testimony of the witnesses in this Scala case, especially in respect to the physical injuries, and the lamentable delay in taking the injured employee to the

hospital—even the length of time he was conscious is almost identical. But there is this great difference, which makes the Scala evidence far stronger than that in the Craft case; Craft did not speak a word after being injured—he only groaned, evidence of his “indescribable agony of mind”; but Scala not only constantly groaned from the time he was injured until after he was placed in the ambulance (40 minutes according to some of the evidence), but evidenced his “indescribable anguish” in the words that for nearly two thousand years have always expressed the highest degree of conscious suffering: “*OH! MY GOD,*” the cry of one suffering “almost indescribable agony of mind and body.”

When this Court affirmed the Craft case in 237 U. S., 648, it disposed of the defendant's contention in the following language, and, of course, at that time it had before it the Printed Record containing the evidence and the above-quoted decision of the lower Court:

“The defendant insists, as it did in both State Courts, that the recovery could not include anything for the pain and suffering of the decedent, first because there was no evidence that he endured any conscious pain and suffering. * * * The first objection must, we think, be overruled. The record discloses that the decedent survived his injuries more than a half hour, and that they were such as were calculated to cause him extreme pain, if he remained conscious. A car partly passed over his body, breaking some of the bones, lacerating the flesh and opening the abdomen, and then held him fast under the wheels with a brake rod pressing his face to the ground. It took fifteen minutes to lift the car and release his body, and fifteen minutes more to start him to the

hospital in an ambulance. It was after this he died, the time not being more definitely stated. **AS TO WHETHER OR NOT HE WAS CONSCIOUS AND CAPABLE OF SUFFERING THE EVIDENCE WAS CONFLICTING.** *Some of the witnesses testified that he was 'GROANING EVERY ONCE IN A WHILE,' and that when they were endeavoring to pull him from under the car 'he would raise his arm' and 'try to pull himself,' while others testified they did not notice these indications of consciousness, and that he seemed to be unconscious from the beginning.* **THE JURY FOUND HE WAS CONSCIOUS,** and both State courts accepted that solution of the dispute. Of course, **THE QUESTION HERE IS NOT WHICH WAY THE EVIDENCE PREPONDERATED,** *but whether there was evidence from which the jury reasonably could find that while he lived he endured conscious pain and suffering as a result of his injuries.* **THAT QUESTION, WE ARE PERSUADED, MUST BE ANSWERED IN THE AFFIRMATIVE.** But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." (Capitalization and italics, ours.)

Let us now carefully compare the testimony in the

case at bar with what was said by the two appellate Courts in the Craft case.

It is undisputed in the testimony that the trolley pole in question is at or just beyond McCoy's Station, in the District of Columbia, about *a mile or more* out of Georgetown (R. 23, 26, 30, 40, 51, etc.).

Witness *Hardy* stated that after Scala was struck :

"We ran back and picked him up. He was bleeding very bad; right down in his crotch; *he was still living.*"

"Q. He was still living then, though? A. He was still living, and he said, 'OH, MY GOD.'

Q. As regards suffering, what can you say? A. *He was suffering pretty bad.*

Q. He was conscious? A. Well, he said, 'OH, MY GOD.' I suppose he was conscious" * * * (R. 22.)

That he (Scala) was there between three and five minutes before he was placed upon another car to be taken home, and it started right in. Witness did not go in with it. (R. 23.)

Q. During all that time what was the condition of the man as you observed it? A. **THE MAN WAS SUFFERING PRETTY BAD.** He was all cut to pieces. I remember I picked him up and right in here (indicating) it was just like a piece of raw liver (R. 23.)

Witness *Mart:* stated that after Scala was struck the car went about a block, and then witness went back, and

"when they found the man he was sitting down; he had dropped down with his head towards his knees * * * there were several had hold of

him. * * * He sounded like he was moaning.

Q. *He made some sound of that kind?*

A. *Yes, sir; I don't think he was quite dead. There was life in him.*" (R. 25.)

Witness *Perry* stated:

"That after the accident they went back and found the man and stopped the other car. Decedent was pretty well rolled up in the dirt, and he had nothing to say. He made a moan or so, and that is about all I heard of it.

Q. *You heard him moaning?* A. *Yes, sir. That several other fellows put him on the car.*" (R. 26-7.)

Witness *Whalen* stated:

"I was the first one that got back to him after the accident. * * * He was lying face down * * * I stopped one of the other cars and helped place him on the car which carried him to the hospital. The witness came to the hospital with him. * * *

He was groaning when I got back to him, but whether he had ceased groaning before he got to the hospital I will not say positively?

Q. He was groaning? A. He was groaning at the time when I got back to him, when he was lying on the ground." (R. 31.)

On cross-examination:

"Q. He was unconscious from the time you first saw him? A. Yes, sir. He did not speak a word. That he was groaning but did not seem to be conscious. * * * When he got to him he was lying face downward. * * * I thought

he would breathe better if there was any life in him, and so I turned him over." (R. 32.)

The only other witnesses in the case who saw Scala in the period after he was struck and *before* he was placed on a car to be taken to the hospital were two of defendant's witnesses, who were not questioned as to Scala's suffering; Vogel (R. 44), and Wiser (R. 50). From the testimony of the four witnesses above, it will be noted that Martz and Perry were not active in assisting Scala, and were probably standing back, because one said: "There were several had hold of him," and the other: "That several other fellows put him on the car," *but they both did hear him groaning*; and that Scala, when Whalen first reached him, was lying *with his face down*; and that Whalen turned him over, and then went away to stop another car to take Scala to town and then returned and placed him on the car; and that Whalen heard Scala groaning but did not hear him speak. It is significant, however, that the witness Hardy, who was near Scala, *and who picked him up*, probably after Whalen had turned him over and *while Whalen was stopping the other car*, heard Scala in his agony not only groan, but use the words of suffering: "*Oh, my God.*" All four of these witnesses testified Scala was alive and groaning after being struck and before he was placed on the car to be taken in the city. The evidence is conflicting as to how long after Scala was struck it was *before* he was placed on the other car, and how soon *after that* the other car started in, as

Witness Mrs. Tarbell stated that after Scala was struck,

"The car backed and waited for another car to come from Glen Echo toward the city and

take the body, 'BUT MY, IT WAS A LONG TIME.' " (R. 20.)

Witness *Hardy* stated:

"That he was there between three and five minutes before he was placed upon another car to be taken home, and it started right in." (R. 23.)

Witness *Martz* stated:

"There was so much excitement there. He was gathered up as quickly as they could; another car came up from the rear running our way," etc. (R. 25-6.)

The inference would be that the car going to the city arrived *afterwards*.

Witness *Whalen* stated he

"came on the car with him to the hospital; all the way, and did not leave him. There was no delay. The cars run pretty frequently out there, and we flagged a car coming in back and we put him on the first car that came along and took him to 36th street," (R. 32).

Witness *Holmes* stated:

"that he did not go back; that his car stood there *fifteen minutes*," (R. 46).

Witness *Wiser* stated:

"that he was in charge of the car as motorman that Conductor Scala was on; * * * it was about 8:19 that the accident occurred. * * * I got off and taken my red light out of the back

and went *back* and stopped the next car. * * * and then I came back to the body where I found him. * * * We took him and carried him across the track and put him on the eastbound car for the hospital. * * * I taken my car then and went back. * * * McCoy's Station from Georgetown * * * about a mile * * * it takes it about five minutes to run it." (R. 50-1.)

From the testimony of the above six witnesses it is shown that some time at least elapsed after Scala was struck *before* he was placed upon another car. The witness Tarbell said "*it was a long time.*" Witness Wisner stated he helped place Scala on another car, and then took his own car away, but does not state just how much time elapsed between the injury and when he took his own car, but that time is fixed by the preceding witness, Holmes, as "*fifteen minutes.*" The witness Whalen stated "there was no delay," but this remark was probably in reference to his preceding statement relative to the progress of the car on which Scala was brought to the city. Whalen came in on the car with Scala to the city, as we have seen before, but was not positive as to whether he had ceased groaning before he reached the hospital. It took five minutes or more for that car to reach the city.

When the car bringing Scala into the city after the injury reached 36th and Prospect Ave., N. W., the junction point (R. 24), Scala was still suffering conscious pain, because

Witness *Mrs. Knowles*, who knew Scala, and whose husband kept a lunch room at that junction, testified that as the car came in she jumped on it, and

"No sooner had I got on the car than I took my hand and put it on the man on the floor of the car and someone said, 'Who is it?' I said, 'It is Scala.' * * * I stayed there and rubbed the man's forehead AND HE OPENED HIS EYES AND LOOKED KIND OF RATTLED LIKE, AND GROANED. That she stayed there with him about five minutes and no one came around to do anything with him, but she went away to get some water; that there was a crowd there when she got back; THAT IT WAS 15 OR 20 MINUTES BEFORE HE WAS TAKEN TO THE HOSPITAL, which is about a square from where he then was; that he laid there on the car.

Q. What can you say with regard to his suffering any pain about that time? A. He just simply groaned. That is all I know" (R. 24).

That Scala was suffering conscious pain when he reached that junction point, distant a mile or more (R. 51) from McCoy's Station, the place of the accident, is evidenced by the fact that when the witness Knowles rubbed his head "HE OPENED HIS EYES," and he was groaning while he was lying there on the car.

And that, after lying on that car (15 or 20 minutes according to the witness Knowles) he was still suffering conscious pain after being taken from the car and while being placed in an ambulance is shown by

The witness *Burroughs*, who stated:

"He only saw Conductor Scala when he was in an ambulance, being taken to the hospital at Georgetown, at 36th and Prospect Avenue, when they were taking him from the car to the hospital.

Q. Was he living at that time? A. Well, he had life in him, that was about all you can say.

Q. Did you hear anything? A. You could hear a little groan from him."

On cross-examination:

"Q. He was unconscious at that time, was he not, Mr. Burroughs? A. Yes, sir."

On redirect examination:

"Q. Do you know whether he was unconscious or not, or whether he was in conscious pain when he was groaning? A. No, I could not say. For the crowd, all I could hear was this groan.

Q. You could not say whether he was conscious or unconscious? A. No, I could not say whether he was conscious or unconscious.

Q. ALL you heard was his groan? A. Yes."
(R. 23-4.)

It will be noted that, notwithstanding the crowd, which this witness and which witness Knowles had testified to as having gathered around there, this witness Burroughs was able to hear, *above all the noise and conversation naturally incident to a crowd like that*, the groaning of this unfortunate conductor. At that time, *half an hour or more after being injured*, he was still living and evidencing his conscious pain by his constant groaning.

He was then taken to the hospital where Dr. O'Donnell saw him, and who testified that "he was still alive when he was brought to the hospital," and that he did not see him until "three or four minutes" after he was brought

there, and that Scala did not die until "about two or three minutes after" witness saw him (R. 27-8). This witness testified also as to the physical injuries suffered by Scala; and in addition to his testimony on that point, plaintiff produced in evidence the "schedule of the autopsy" made by Dr. C. S. White two days after the death (R. 28-9).

Connecting all the above testimony together, we see that after Scala was injured, it was 15 or more minutes before he was placed on another car, 5 minutes or more to run to 36th and Prospect Streets, 15 or 20 minutes before he was placed in an ambulance, at which time he was still suffering conscious pain, and that it must have taken a few minutes or more to get him into the operating room at the hospital where he died about 6 or 7 minutes after arrival. During this period, soon after injury he cried: "Oh, my God," and 20 minutes or more afterwards, opened his eyes with a look like he was rattled (perhaps the witness meant dismay or horror or anguish, because at the same time he groaned), and during all the time from injury to the time he was placed in the ambulance he was evidencing his conscious pain by his continual groaning. Further, the testimony of Dr. O'Donnell and the autopsy of Dr. White show the extent of his severe injuries, which necessarily produced great pain and agony.

We respectfully submit that the objection of defendant, that there was no sufficient evidence of the conscious pain and suffering of decedent to warrant the submission of that question to the jury, should be overruled under the authority of the Craft case *supra*; and also because the specific objection was not raised below.

Moreover, since there was some evidence of conscious pain and suffering, the trial Court, in accordance with the ruling in the Craft case, *supra*, correctly left to the

jury the determination of that question of fact, and their verdict in that respect should not be reviewed on writ of error or certiorari.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "II (d)."

Defendant's brief, pp. 54, 90, states its sixth, or "II (d)," Point to be that "the action of the trial Court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering," because

"The declaration even as amended failed to assert sufficiently a claim for such pain and suffering (Assignments 3, 19)."

Insufficiency of exceptions to Raise question on appeal that twice amended declaration does not sufficiently plead the claim for pain and suffering.

Again, under this Point "II (d)," we are confronted with a contention which the Bill of Exceptions certifies was not made in the trial Court. Defendant claims its contention is covered by the 3rd and 19th assignments of error, which are, respectively:

"3. The Court erred in applying the Federal Employers' Liability Law to the case stated in the plaintiff's declaration.

"19. The Court erred in refusing defendant's prayer No. X."

We have already seen hereinbefore that defendant claims, pp. 28 and 90 hereof, that the 3rd assignment raises the question of "railroad," and that the 19th as-

signment raises the question of alleged insufficiency of the evidence of conscious pain and suffering. Also we may say, that, defendant's brief in the Court of Appeals did not claim its objection as to the alleged insufficiency of the pleadings in respect to conscious pain and suffering was based on the 3rd and 19th assignments, as it now does, but in that Court claimed only its 5th assignment as the basis of an alleged right to argue the question on appeal.

All of the exceptions to be found in the entire Bill of Exceptions are on pp. 66-7, 68-9, 73-4, of the Record, and we state that it is conclusively shown thereby that defendant never raised in the trial Court any question as to the alleged insufficiency of the allegations of the declaration to support a recovery for conscious pain and suffering *after the second amendment had been allowed and made*. It is true that defendant did, to some slight extent (which is not shown in the Bill of Exceptions) raise some question as to the sufficiency of the declaration as amended on October 20, 1915, but at no time *after the amendment of October 29, 1915, had been allowed and made* did defendant object to, or raise the question, that the declaration as twice amended did not sufficiently plead the claim for conscious pain and suffering. *It made that contention for the first time on appeal.*

In addition to what has been said on pp. 20-33, 90-2 hereof, in reference to our protests against defendant being allowed to argue on appeal questions not fairly preserved in the Bill of Exceptions, it is respectfully submitted that the language of the Court of Appeals, in the case of *Fuller Co. v. McCloskey*, 35 App. D. C., 595, which was affirmed by this Court in 228 U. S., 194, was directed to a similar situation to that which is now pre-

sented in the case at bar by the Bill of Exceptions and defendant's brief in this Court. The Court of Appeals said:

"It is not the duty of the trial Court, but the duty of counsel, to examine and point out such alleged defects, and unless this is done it must be assumed by the Appellate Court that they were waived. * * * The trial justice, nothing having been said as to the sufficiency of the declaration, had no reason to assume that this motion for a verdict was based upon grounds other than those specifically brought to his attention. If the sufficiency of the declaration was to be challenged, it was the duty of the defendant to say so, and his failure in that regard was fatal."

And so, in the case at bar, if after the amendment of October 29, 1915, had been made, its sufficiency was to be challenged on appeal, it was the duty of defendant's counsel to say so *in the trial court*, and his failure in that regard was fatal. Is there any doubt in the minds of this Court that, if defendant had made such an objection in the trial court, the defect, if any, would not have been promptly cured by amplification of the granted amendment, because the trial Justice had held that plaintiff was entitled to go to the jury on the claim for conscious pain and suffering, and had permitted the amendment with that end in view.

And the language of Mr. Justice Hughes, in delivering the opinion affirming the Court of Appeals, exactly covers the situation:

"The contention based upon the asserted insufficiency of the declaration is without merit. *So far as it appears the evidence was received without*

*any objection upon this ground. * * ** The attention of the trial Court was not called to any particular in which the declaration was deemed to be insufficient * * *, and no mention was made of the specific point now raised. If this point had been suggested, it is apparent that, in view of the allegations contained in the declaration, *such variance as there was between pleading and proof could properly have been met by an immediate amendment, and the case could then have been submitted to the jury precisely as it was submitted.*" (Italics ours.)

The Declaration as amended on October 29, 1915, sufficiently pleaded the claim for pain and suffering.

However, irrespective of the fact that the question was not fairly presented in the Trial Court or preserved by proper exception in the Bill of Exceptions, plaintiff contends that the declaration in the case at bar as amended on October 29, 1915 (R. 8, 9, 68), sufficiently pleaded or "pointed" to the claim for conscious pain and suffering to correctly support a recovery therefor and to justify the verdict of the jury herein.

In support of the foregoing, reference is made to the printed Record on file in the Clerk's Office of this Court in the case of St. L., I. M. & S. R. Co. v. Craft, 237 U. S., 648. Pages 94 and 95 of defendant's brief contain a somewhat misleading statement in regard to that Craft Record. Defendant's brief omits to state that the second and third counts of the Craft declaration were framed under the State statute—the first count was under the Federal Employers' Liability and combined both the claim for pecuniary loss to the beneficiaries and the claim for conscious pain and suffering of the decedent as elements of the one cause of action of the first count. De-

defendant's brief also omits to state that the Craft Record shows that the trial Court overruled a *demurrer* which had been interposed to each paragraph of plaintiff's complaint *upon the ground that the same does not state facts sufficient to constitute a cause of action*. After the overruling of said demurrer, the plaintiff elected "to take a non suit as to the second and third paragraphs of the complaint." Defendant's brief, therefore, fails to state that in the Craft case the plaintiff went to the jury on the first count alone, *after the sufficiency of that count, as matter of law, had been sustained*, and recovered on the first count alone. Therefore, in comparing the declaration in this Scala case at bar with the complaint in the Craft case, on the question of the sufficiency of the pleadings to sustain a recovery for conscious pain and suffering, we have to look only at the first count of the Craft case, and can entirely disregard all other counts of that complaint.

Fourth count of SCALA declaration at bar as per Record herein.

After the allegation of defendant's negligence:

(R. 7-8): " * * * the deceased * * * was hit or struck by one of the said posts * * *, and was thereby knocked from said car violently and suddenly to the ground and his back-bone or spine at or near the base thereof was crushed and broken, and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages,

First count of Craft declaration as per CRAFT Record.

After the allegation of defendant's negligence:

(R. 10): "The said deceased * * * was knocked or caused to fall beneath said coal car, thereby causing the wheels of said car to pass over and upon said deceased, many great and fatal injuries, which thereafter resulted in his death.

* * * * *

(allegation of pecuniary loss to beneficiary) * * *. Plaintiff says that by the

and causing him to suffer intense pain and injuries in direct consequence whereof the said deceased died, on, to wit, the eighth day of July, within one hour after being hit and struck as aforesaid; * * * (allegation of pecuniary loss to beneficiaries) * * * by reasons of the wrongful act, negligence and carelessness of the defendant resulting in the conscious pain and suffering and in the death of said deceased

* * * * *

Wherefore the plaintiff says that by reason of the premises and in accordance with the statutes in such cases made and provided, the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal representative of said deceased on behalf of and for the benefit of the said parents of deceased and accordingly the plaintiff brings this suit and claims the sum of Twenty Thousand (\$20,000) Dollars."

injuries inflicted upon said deceased, suffered great physical pain, mental anguish and the agonies of death for a period of over three hours, by reason of all this plaintiff claims damages in the sum of \$30,000.

Wherefore the premises considered, plaintiff prays judgment for the benefit of J. T. Craft, father of said deceased and the next of kin in the sum of \$30,000, cost and all proper relief."

We have quoted above every word in the Craft declaration that could, by the most liberal construction, have any reference to the claim for the pain and suffering of the decedent, and on no other language than that quoted

above from the first count of the Craft declaration, this Court sustained a recovery for conscious pain and suffering in 237 U. S., 648.

The only possible objection that might be urged against the sufficiency of the Scala declaration is that the amendments are, perhaps, not inserted in proper place in the declaration in order to constitute "grammatically and logically" (defendant's brief, pp. 91-2) a "demand" for the conscious pain and suffering of decedent; but the case of *Baker v. Warner*, *supra*, (pp. 59 hereof), conclusively answers such a technical objection.

We respectfully submit that the twice amended declaration in the case at bar sufficiently pleaded or pointed to the claim for conscious pain and suffering, and that the *contra* contention was never raised below, and should not now be considered.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "II (e)."

Defendant's brief states its seventh, or "II (e)" Point, to be that "the action of the trial Court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering," because

"The allowance of the amendment operated a surprise and appellant's motion for a continuance should have been granted (Assignments 5, 6)."

Plaintiff replies:

First: That defendant did not comply with Law Rule 45 of the trial Court.

Second: Discretion of trial Court in refusing continuance cannot be reviewed by appellate court except for *gross* abuse of discretion.

Third: In the case at bar there was no abuse of discretion by trial court in refusing continuance.

Fourth: There was no surprise on part of defendant, entitling it to a continuance.

FIRST.

Law Rule 45 of the trial Court provides:

"Continuances.—An application for a continuance shall be by motion supported by sufficient affidavit disclosing the grounds therefor, unless such affidavit be waived by opposing counsel. In order to be entertained such motion and affidavit shall be filed as long before the calling of the cause for trial as reasonable diligence requires. * * *

If this Court adopts plaintiff's contention (pp. 115-22 hereof) that the language of the original declaration and of the first amendment to the declaration, that made October 20, 1915 (R. 8-9, 17), was sufficient to put defendant's counsel (an attorney for a railroad corporation, and, therefore presumably conversant in fact with the Amendatory Act of 1910 and the then decisions of this Court thereon) on notice, then and there, that plaintiff was making claim by that amendment for the pain suffered by her decedent before death, it necessarily follows that "reasonable diligence" under said rule 45 "required" him to file his motion and affidavit prior to, or at least on, the day set for the "calling of the cause for trial," "unless such affidavit be waived by

counsel." There was no such waiver, as a matter of fact, either on the Record or off the Record. Counsel for defendant knew on October 20, 1915, when he obtained a week's continuance, after having stated that "*he did not object to the allowance of said amendment,*" that the case "was set for trial the following week" (R. 17). And, when the case was called for trial the following week, on October 27, 1915 (R. 17), he made no objection whatsoever to proceeding with trial, nor request for further time, but heard, without objecting thereto, the opening statement of plaintiff's counsel, viz:

"We propose to show you, however, that he lived for some time, probably an hour, after the accident, and that he suffered intense pain and agony during that time * * *. He suffered intense pain and agony. *We will claim damages for that*" (R. 17):

and he also heard, without objecting thereto, the testimony of seven different witnesses in support of that claim (R. 23-8, 31-2), and even cross-examined on that point three of those seven witnesses (R. 24, 28, 32); and then waited until the day after both sides had closed their case, and the trial Court had taken the matter of the prayers under consideration over night to make his *oral* motion for a continuance on the ground that he was, forsooth, "*surprised*" (?) by the claim for damages for the pain and suffering of plaintiff's decedent (R. 66-7, 68).

The action of the trial Court in overruling said oral motion was right, and, therefore, the fifth and sixth assignments of error should be disregarded by this Court.

SECOND.

Said Law Rule 45 also provides:

"All continuances shall be in the sound discretion of the court."

It is the settled practice of this Court, and of all Federal Courts, based on a long line of uniform decisions, that the grantal or refusal of a continuance lies in the sound discretion of the trial court, and can not be reviewed on appeal, except in a clear case of gross abuse of discretion.

See *Bradshaw v. Stott*, 7 App. D. C., 276; *Crandall v. Lynch*, 20 id., 73; *Riddle v. Gibson*, 29 id., 237.

And this Court in *Goldsby v. U. S.*, 160 U. S., 70, said:

"That the action of a trial court upon an application for a continuance is purely a matter of discretion not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." *Isaacs v. U. S.*, 159 U. S., "

THIRD.

The allowance of an amendment to the declaration does not entitle the defendant to a continuance, "*as of course*," but only "*in case the ends of justice require it*," that is, where to refuse the continuance would be an abuse of sound discretion, because the D. C. Code provides:

"Sec. 339. In all judicial proceedings the court,

justice or judge, in which; or before whom, the cause shall be pending shall have power upon such terms as shall seem best, *at any stage of the case*, to allow amendments of writs, pleadings, or other papers in the cause," etc.

"Sec. 400. Continuance. No such amendment shall entitle either party, as of course, to a postponement of the trial or to a continuance of the case to the next term of the court, but the court shall allow a postponement or continuance in case the ends of justice require it, and upon such terms as the court shall deem proper. If such amendment is ordered and a postponement or continuance is allowed after the jury has been sworn the jury shall be discharged."

We have, in our "First" answer under this question of continuance, (pp. 111-12 heresof), and in our replies to defendant's other points, (pp. 55-111 heresof), demonstrated that *the trial court was right* in the allowance of the amendment in question; and will not repeat what was there said, but, we submit the following

FOURTH

ON THE QUESTION OF SURPRISE

In addition to the averments of the original declaration in respect to the injuries suffered by decedent, the declaration was amended on Oct. 20, 1915, (R. 8, 9, 17), by inserting therein the words "and causing him to suffer intense pain and injuries," THIS BEING SEVEN DAYS BEFORE THE TRIAL COMMENCED on October 27, 1915, (R. 17). The evidence on both sides was closed on the afternoon of October 28, 1915, and the

Court then proceeded to consider the tendered prayers in the case. (R. 66-7.) Defendant, in contending that it was *surprised* by the allowance of the amendment of October 29, 1915, which was the second day of argument on the prayers (R. 67-8), is forced to take one of two positions, viz.:

1. It must admit that on and from October 20 to 28, 1915, it *knew* that a claim for pain and suffering of a decedent could be recovered in the same action with a claim for pecuniary loss to decedent's beneficiaries.

2. Or, it must admit that on and from October 20 to 28, 1915, it *did not know* that such was the law as provided by the Act of 1908 as amended in 1910.

First, it will not avail defendant, after taking the first horn of the dilemma, to say it did not know that, by the amendment to the declaration of October 20, 1915, (R. 17), a claim for conscious pain and suffering was being asserted under the Amendatory Act of 1910; because, if that amendment of October 20th afforded no proper foundation for the claim, then defendant should have objected to the testimony offered in support of that claim; and also, because, irrespective of the pleadings, defendant was put on *actual* notice of the assertion of the claim by the opening statement of counsel for plaintiff (R. 17), and by the testimony of seven of plaintiff's witnesses (R. 23-8, 31-2) in support of the claim. Counsel for defendant cross-examined three of those seven witnesses (R. 24, 28, 32). The testimony of three of those seven witnesses, Mr. Burroughs, Mrs. Knowles and Dr. O'Donnell, was directed solely to the claim for conscious pain and suffering of deceased; they were not witnesses to the accident—and counsel for appellant cross-examined the witnesses Burroughs (R. 24), Whalen (R. 32), and O'Donnell (R. 28).

If defendant thought that it had a valid objection to

the claim for conscious pain and suffering of deceased, on the ground that the declaration as first amended was not sufficient to sustain a recovery therefor by plaintiff, was not its proper course to interpose timely objections, viz.:

During, or at the close of the opening statement of plaintiff's counsel; and

As plaintiff introduced evidence on the conscious pain and suffering of her decedent.

If defendant was aware of the effect of the Act of 1910, was it not too late for it to claim surprise after all the testimony was closed? If it knew the effect of that Amendatory Act, could it sit back throughout the testimony, without objecting to the introduction of evidence of the conscious pain and suffering of decedent, until after the evidence was closed, and then *in fairness* claim surprise on the score that the pleadings made no sufficient claim on that point? If it thought it had a valid objection to the claim, why did it not interpose that objection to the testimony? Surely defendant knew that an objection properly lies to any evidence in support of a claim not alleged in the declaration. From its conduct during trial, it would seem that defendant, with actual notice that the claim was being asserted was seeking to obtain a technical advantage. The "ends of justice" do not "require" the upholding of such a technical objection. In the recent case of *Seaboard A. L. v. Koennecke*, 239 U. S., 352, the declaration did not allege, *totidem verbis*, whether it was brought under the Federal Employers Liability Act or under a State statute, and this Court in affirming the judgment for plaintiff said:

"In view of testimony brought out * * *

the plaintiff asked leave to amend so as to bring the case under the Employers' Liability Act. * * *. The amendment was allowed over a denial of the power of the Court to allow it. * * *. The defendant then objected to the trial going on. The Court left it to counsel to say whether he had been taken by surprise, and, the counsel not being willing to say so, although saying that he was not prepared on the question of dependency, ordered the trial to proceed."

(In the case at bar counsel stated "he had made no preparation on that line *under his right to rely upon the pleadings*") (R. 68).

"There is nothing to show that the trial Court exceeded its discretionary power in allowing the trial to go on. * * * THE COURT MAY WELL HAVE CONSIDERED THAT THE DEFENDANT WAS ENDEAVORING TO GET A TECHNICAL ADVANTAGE, AS IT HAS A RIGHT TO DO, BUT THAT IT SUFFERED NO WRONG. The cause of action arose under a different law by the amendment, but the facts constituting the tort were the same, whichever law gave them that effect, and the Court was warranted in thinking that on the matter of dependency THERE WAS NO SURPRISE." (Capitalization ours.)

The real surprise in the case at bar was that of plaintiff—surprise at defendant's contention made after the close of the testimony that defendant *could* have been surprised by the claim for conscious pain and suffering.

2. Coming to the other or second horn of defendant's

dilemma: If the defendant admits that on Oct. 20 to 28, 1915, it was not fully aware of the effect of the Amendatory Act of 1910 as construed by the then decisions of the Federal Courts, its surprise is that due to ignorance of the law. It is unnecessary to cite authorities supporting the proposition that a continuance should not be allowed a defendant because of unfamiliarity with the precise intent of the Amendatory Act of 1910 as construed by the decisions, *supra*.

Counsel regret that the Record compels the irresistible conclusion that such indeed was the surprise in the case at bar; as demonstrated by defendant's position on the afternoon of the second day of trial, Oct. 28, 1915 (R. 66-7). Not until the Court "proceeded to consider Plaintiff's Prayer No. 6" was a word of objection interposed to the claim for conscious pain and suffering. The objection then made was clean-cut, without equivocation, and was that "under the authority of the case of Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59, there could be no recovery under the Employers' Liability Act of 1908 and Amendment of 1910 for the conscious pain and suffering of decedent before his death for the benefit of the beneficiaries, but *that recovery was limited to the pecuniary loss of the beneficiaries by reason of his death.*" (R. 66-7.) The contention advanced by defendant was that it mattered not whether the declaration did or did not contain a claim for damages for the conscious pain and suffering, because in *no* case could there be a recovery therefor in view of the decision of the Vreeland case. Counsel for plaintiff called the attention of the Court and of counsel for defendant to the fact that the reason of the ruling in the Vreeland case was that therein the death occurred before the enactment of the Amendatory Act of 1910, but counsel for defendant was emphatic in his conten-

tion that no matter what the pleadings were, no matter what the proof was, no matter when the date of death was, or when the suit was filed, there could not be in the case at bar OR IN ANY OTHER CASE a recovery by an administrator for the conscious pain and suffering of a decedent, because the Vreeland case had decided otherwise; had decided that decedent's claim died with him.

The foregoing contention of defendant made on that afternoon of October 28, 1915, *in view of its change of objection over night as shown by its objections advanced the following day*, placed it on that following day, October 29, 1915, (R. 68), and placed it in the Court of Appeals, and now places it in this Court, under an additional dilemma, namely:

1. It making its said objection on Oct. 28, 1915, *it was not* fully aware of the effect of the rulings of this Court in Ry. Co. v. Craft, 237 U. S., 648, June 1, 1915, and Ry. Co. v. Leslie, 239 U. S., 599 decided June 21, 1915, both holding *contra* to defendant's said objection; or

2. In making its said objection on Oct. 28, 1915, *it was* fully aware of the precise effect of those two said decisions of this Court.

Counsel for plaintiff do not say, and prefer not to think, that defendant occupied the latter position, because in that event, it would have been misleading the trial Court in citing the Vreeland case as the final authority in support of its then contention. It is believed that its then contention was due to its then unfamiliarity with the then latest expressions from this Court on the subject, which, of course, replaces it in the first position of the second dilemma, being the same

as the second horn of the original dilemma, namely:

That defendant admits that its surprise was due to ignorance of the law.

Argument is unnecessary on the proposition that a litigant is not entitled, as of course, to a continuance based on its ignorance of the law.

The fact that on the following day, October 29, 1915 (R. 68), defendant shifted its objection to the contentions that there could be no recovery for conscious pain and suffering *in the case at bar*, because the pleadings did not sufficiently assert such claim, and that it was a new cause of action barred by limitation of the Act, in no way impairs the pertinency, but adds to the cogency, of the second dilemma.

Defendant's brief (pp. 13, 68, 95) would seem to lay some stress upon the language of the trial Justice in permitting the amendment of Oct. 29, 1915, and in overruling defendant's motion for a continuance (R. 68). That amendment was made during the discussion of the prayers in the case. In the course of that discussion, and after counsel for defendant had made the contention that the claim for conscious pain and suffering constituted a new cause of action, the trial Justice (having in mind the unobjected-to evidence in support of that claim) stated to counsel for plaintiff: "I think you will have to amend before you can recover for pain and suffering," and then permitted the amendment containing the distinct averment of "conscious pain and suffering." Counsel for defendant moved for a continuance on the ground of surprise, and in ruling on this motion for a continuance the trial Justice did say: "I will frankly say that if I had been reading that declaration from the standpoint of the defendant I would not have suspected that it was the intention to recover for pain and suffering," etc. But, when counsel for plain-

tiff called to the attention of the Court the fact that the declaration as originally filed "pointed" to the claim for "conscious pain and suffering," the fact that counsel for defendant had "stated to the Court that he did not object to the allowance of said amendment" of Oct. 20, 1915, consisting of the words "and causing him to suffer intense pain and injuries" (R. 17), the fact that counsel for plaintiff in his opening statement had stated to the jury:

"We propose to show you, however, that he lived for some time, probably an hour, after the accident, and that he suffered intense pain and agony during that time. * * * He suffered intense pain and agony. We will claim damages for that" (R. 17),

the fact that plaintiff had produced evidence of the conscious pain and suffering by the testimony of seven witnesses, and the fact that counsel for defendant had made no objection to the introduction of that evidence but had even cross-examined three of these seven witnesses on the precise point of whether or not the injured employee was *conscious*, the trial Justice very properly overruled the motion for a continuance.

It is respectfully submitted that the trial Court's action in overruling the motion for a continuance was correct.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "II (f)."

THE TRIAL COURT'S ACTION IN OVERRULING DEFENDANT'S PLEA OF LIMITATION OF THE ACT WAS CORRECT.

Defendant's brief, pp. 54, 96, states its eighth, or "II (f)," Point to be that "the action of the trial Court as affirmed by the Court of Appeals was erroneous in respect to the question of recovery for conscious pain and suffering," because

"The appellee's (plaintiff's) demurrer to the appellant's (defendant's) plea of the statute of limitations should have been not sustained (Assignment 7)."

The seventh assignment of error is as follows:

"The Court erred in sustaining the plaintiff's demurrer to the defendant's plea of the Statute of Limitations filed by leave following said amendment." (R. 13.)

Defendant's entire argument, p. 96, or five lines in all, would seem to indicate that defendant's counsel does not attach much importance to this Point. Indeed, it would seem to be an attempt to raise some question of technicality as to procedure; and it may be technically answered by saying, that said assignment reading: "defendant's plea * * * *filed* by leave, strictly and technically refers to a *written* plea, which can be *filed*, and, therefore, is directed to a situation which does not exist in the instant case, because there

was no such written plea *filed*. Defendant *orally* pleaded (R. 68), or rather made the objection of the statute of limitations, and plaintiff *orally* demurred or objected thereto, and the trial Justice immediately sustained the demurrer or objection, by overruling the contention based on the statute of limitations. This was after the trial Justice had allowed the amendment of October 29, 1915 (R. 8, 9, 68), which was merely in amplification or extension of the former allegations in support of the claim for conscious pain and suffering, and which amendment merely consisted of a more specific averment in respect to that claim, and which, therefore, did not introduce any new cause of action. The trial Justice permitted the amendment under the discretion vested in him by Section 399 of the D. C. Code; and, exercising his discretion as to "terms," he allowed the parties to plead and demur (object) orally, so that, after sustaining the demurrer and overruling the plea, the evidence on that claim already introduced (without objection on defendant's part) could be submitted to the jury.

We have, also, in our Answers to defendant's Points "II (a)," pp. 55-69 hereof, "II (b)," pp. 69-89 hereof, shown that the claim for conscious pain and suffering was not barred by the limitation of the Act.

It is respectfully submitted that there is no merit to the 7th assignment of error.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "III (a)."

Defendant's brief, p. 97, states its ninth, or "III (a)" Point to be that:

"III. There was no evidence of negligence on the part of the appellant resulting proximately in the death of appellee's decedent. Hence the Court erred in failing to direct a verdict for appellant at the conclusion of the appellee's evidence and again at the conclusion of all the evidence (Assignments 1, 2, 3, 4, 8, 14) :

"(a) Because the appellee's own evidence uncontradicted showed that the decedent came in contact with the pole after he lost his footing, and that he did not lose his footing because the pole struck him."

INSUFFICIENCY OF GROUNDS OF DEFENDANT'S TWO MOTIONS FOR DIRECTED VERDICT TO RAISE ANY QUESTION OF EMPLOYERS' LIABILITY ACT.

In view of the fact that the 3rd and 4th assignments of error (R. 13) complain of the action of the trial Court in applying the Employers' Liability Act to the case, and in view of the fact that defendant's brief, in stating said above Point "III (a)," claims that said 3rd and 4th assignments are based on its two motions for a directed verdict, we are confronted again with its erroneous assertion, that its two Motions for a directed verdict raised the question of the Employers' Liability Act. We respectfully refer this Court to what has been already said on pp. 20-33, hereof, and again, respectfully, call attention to the certificate in the Bill of Exceptions in respect of the *sole* grounds of defendant's two motions for a directed verdict, namely :

"At the close of the plaintiff's case, the defendant * * * moved the Court * * * to instruct the jury to return a verdict for the defendant upon the ground that the evidence is not sufficient to maintain the case stated by the plaintiff in her declaration, stating,

'as matter of law, that a pole 30 inches away from the stanchion under the circumstances shown in this case is far enough away to relieve the company from any negligence if a man is injured walking along the running-board with reasonable care;'

and stating the evidence showed that decedent was injured as the result of 'assumption of risk;'

and in addition to that, stated there is no evidence here to sustain any other assumption but that this man was injured as the result of losing his foothold on the running board.

THESE WERE THE ONLY SPECIFICATIONS MADE BY COUNSEL FOR DEFENDANT IN SUPPORT OF HIS MOTION." (R. 41-2).

"And this being *all* the evidence, * * * the defendant renewed its motion to have the Court instruct the jury to return a verdict in favor of the defendant." (R. 60).

Decedent's injuries were not due to his losing his foothold, but were due to his being struck by a pole negligently and carelessly placed and maintained too close to the passing car.

Defendant's brief, pp. 97-116, is mainly devoted to the

attempt to maintain its theory as to how the injury to decedent was caused, which theory, however, is contrary to the evidence in the case as found by the verdict of the jury. Moreover defendant's theory that decedent slipped or was careless in moving along the running-board of the car before he was struck by the pole, and that, therefore, the jury should have been instructed to return a verdict for defendant, is absolutely contrary to the provision of the Act, which expressly provides that the contributory negligence of the plaintiff shall not bar his right to recovery but only goes to the mitigation of damages.

The testimony of the witness Whalen, who was called by both sides, is more fairly inspected in the Bill of Exceptions (R. 29-33, 47-50) than in the ex parte excerpts in defendant's brief.

It is submitted that the question as to how the injury occurred was one of fact to be determined, as the Trial Court correctly ruled, by the jury; but the following facts stand out prominently in the testimony of the witness Whalen as showing that decedent did not slip, or miss his footing, *until after he was struck by the pole*, which was negligently maintained too close to the running-board of decedent's car.

As a witness of plaintiff:

Decedent "was perfectly sober, *attending to his business*," and "had his right hand *ahold* of the first upright post." (R. 29-30.)

"His hold apparently seemed to be firm." (R. 30.)

On Cross-Examination: "The car was going along and the pole struck him and drove him into me, and I grabbed for him." (R. 31.)

"Upon redirect examination the witness stated

that the deceased apparently had a firm hold on the stationer AT THE TIME THE POLE STRUCK HIM" (R. 32).

Is a witness for defendant.

On Cross Examination: "stated that Seely apparently had a firm hold of the stationer with his right hand" (R. 49).

On Further Cross Examination: "I am not familiar with the pole."

Q. You cannot say this would not have struck him unless he was on the running board and holding on with both hands?

A. Why, I would not say he could not.

The witness could not say how far this pole was from the car, nor the average distance, though in passing he had seen the pole; that he could not state "that some could not have been struck by this pole when on that car without leaving the car or losing hold of the stationer, unless the particular pole was unusually close to the road and he does not know whether it was or not."

Q. You mean the average pole will not strike a man, that is what you mean in other words.

A. That is what I mean, yes sir. (R. 50, 51.)

Defendant's brief, pp. 200-2, states from the testimony of the witness Percy, that it seems to prove the case against and against which complaint was taken. When grabbed he descended directly and then struck by the pole, and that it was about directly and then struck by the pole that he fell.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "III (b)."

NEGLIGENT PROXIMITY OF THE POLE.

Defendant's brief, pp. 97, 116, states its tenth, or "III (b)," Point to be that the trial Court erred in not sustaining defendant's two motions for a directed verdict, "(Assignments 1, 2, 3, 4, 8, 14)."

"Because the line of poles was not negligently placed dangerously near the tracks as alleged in the declaration."

Defendant's brief is in error when it states, pp. 116-7, that it was not until plaintiff reached the Court of Appeals that attention was directed to the point "*that it was uncontradicted in the testimony that pole No. 187 was located on a slight curve; that other adjacent poles were located at greater or safer distances.*" The evidence itself on those points, which defendant admits was *uncontradicted*, drew attention to the negligent conditions in respect to that pole. The Bill of Exceptions may be searched in vain for any objection, or exception, of defendant in respect to the admission of that evidence. It is highly significant that, although defendant produced, as witnesses in its behalf, its Inspector, Keiser (R. 51-2), its employee H. S. Gormley (R. 53-5) who made photographs and took measurements of the pole in question and other poles, its employee Johnson (R. 56-9) who "made certain clearance measurements" of the pole in question "and certain poles in that vicinity," etc., the witness Edwards (R. 59-60), by profession a civil engineer, and "in the employ of the Engineer of Highways of the District," and who measured the

distance of that pole just previous to taking the witness-stand, not one of defendant's said witnesses, or any other of its witnesses, testified to any pole on that line being as near to the track and passing cars as was Pole No. 187, which was 3 feet 11 inches distant *from the inside edge of the rail* (as stated by every witness who testified as to distances), and which was *the pole that struck decedent*. The jury's attention was called to that negligent condition, and the jury also heard the testimony as to there being a curve to the right on the west-bound track, at that point, which testimony was also *uncontradicted and not objected to by defendant*.

Defendant's brief (p. 117) is also in error in speaking of the evidence just referred to, (and the evidence of plaintiff's witnesses was even stronger), as "flimsy pretexts," and in error in intimating that pole No. 187 had "a rake or inclination from the track"—(it was "a plumb pole—very plumb, and all the rest of them are leaning from the track"; "this 187 is practically plumb," R. 40-1); and said brief is also in error in stating "at a height of four feet from the rail there was at least a clear space between the outside of the car and this pole of thirty-three inches," because defendant's own expert witness Johnson (R. 57-9) said that: "*The distance between outer edge of the running-board, that is, the board upon which the man (decedent) walked, and the nearest point of the pole 187 was 19 $\frac{3}{8}$ inches, outside of the running-board to the nearest point on the pole.*" (R. 57.) Also, "that the distance from pole 187 * * * to the handle bar is 25 $\frac{1}{2}$ inches just above the socket with the car standing still." (R. 58.) This is much less than the length of the average man's arm. These measurements were made with the car standing still, and it must be borne in mind that the evidence shows the car was an open summer-car, with a running-board, or foot-

board, for the conductor (decedent) to walk along collecting fares, and with handle bars for him to hold on to, and it must also be borne in mind that the evidence shows that the car was west-bound and "at an exceedingly great speed" and "swaying horribly," "around a curve," "swerving crosswise" (R. 38). Therefore, owing to the fact the car was westbound, and that the "south rail is higher than the north rail" (R. 59), going around the curve there, and the fact that "these summer cars have very good springs on them" and "can sway from side to side," (R. 37), necessarily "the difference in height of two rails" and the spring of the car, "would cause the car to lean over going around that curve" (R. 59), and, therefore, towards the pole which was north of the north or lower rail. Therefore, when the car was *in motion*, under the circumstances as testified to in the case at bar, that distance of only $19\frac{3}{8}$ inches between the running-board and pole and that distance of only $25\frac{1}{2}$ inches between the handle bar and the pole were materially lessened by probably seven or eight inches, thus making the distance between the handle bar on the car and the pole about "to-wit 17 inches" and the distance between the running-board on the car and the pole "less than to-wit 17 inches" as alleged in the declaration.

It is in the face of that evidence in the Record, that this Court is asked by defendant to negative the finding of the jury as to negligence, and to rule as matter of law that, with decedent on the running-board of the passing car, engaged in his duties as conductor, the pole which struck him was not in negligent proximity to the passing car.

In addition to the foregoing general summary of the evidence on the point of defendant's negligence in regard to the negligent proximity of the pole in question to the passing car;

The testimony of the witnesses on behalf of plaintiff in regard to appellant's negligence was in part as follows:

Witness *Tarbell*:

"That in her opinion the car was going between 25 and 30 miles an hour just before and at the time of the accident. It was going very fast * * *; that the car was going about as fast as * * * a steam railway, an accommodation train, about 30 miles an hour. * * * The car turned a curve and was going so fast that something struck him. * * * *He was clinging in closer because the space was so narrow.*" (R. 19-20.)

"The passageway is so narrow at different places. (R. 21.) *It was a narrow place and the car was going so fast. * * * The poles are very close to the place. * * ** The car had given a lurch. * * * swaying; yes, it was going so fast.

"Q. A roll? A. Yes, sir;" (R. 21-22).

Witness *Hardy*:

"The car was going at a pretty good rate of speed," (R. 22). The accident was just beyond McCoy station, three or four poles beyond," (R. 23).

Witness *Martz*:

"The car was running very fast. * * * That the car went about a block before it could stop. * * * It was right on a bend" (R. 25-6).

Witness *Perry*:

"The accident occurred about the third or fourth pole beyond McCoy's station, going west."
(R. 26.)

Witness *Mrs. Birge* stated:

"The car was running at a high rate of speed, as fast, I think, as I have ever ridden. We were discussing that it was an exceedingly great speed. That the car was swaying horribly; they had just come around a curve; *that it was swerving crosswise.* * * * We were discussing about this * * * car rocking from one side of the car track to the other." (R. 38.)

Witness *Whalen* (who later testified as witness on behalf of defendant stated that the following morning after the accident, in company with certain named officials of the defendant company, he went to the scene of accident, where photographs were taken, and measurements were made, and "that there was some discussion about whether the pole that struck the man was closer or not as compared with the other poles along there; but he could not say as to the positive measurement," (R. 30-31). When called as a witness on behalf of defendant, he stated, on recross-examination, that he "could not say how far this pole was from the car, nor the average distance, though in passing he had seen the poles;" and that he could not state whether or not "the particular pole was unusually closer than the rest," and did "not know whether it was or not." (R. 49-50.)

There was an admission made by defendant that it owned "the right of way and the land running from Prospect Avenue up to Glen Echo," (R. 34); and also

an admission "that these poles out there are the same now as at the time of accident." (R. 40.)

Witness *Philip F. Gormley* testified that he had "to-day," October 27, 1915, measured the poles at, or near McCoy's station, and that he made these measurements "from the inside edge of the rail to the nearest point to the pole" and "from the level of the * * * rail." He testified that the poles were numbered, and from his testimony it appears that all odd numbers were the west-bound poles on the north side of the tracks, and all even numbers were the east-bound poles on the south side of the tracks. He testified "that the poles on the south side of tracks are directly opposite to poles on north side, except one."

The following diagram, made up from this witness' testimony (R. 40-1), is respectfully submitted for the convenience of the Court; the curve to the right on the west-bound track, however, is not indicated.

McCoy's								
No.	No.		No.	No.				
189	187		183	181				
*	*	*	*	*	*	*	*	*
4'	3'	4'	4'	4'	6'	4'	7'	8'
6 $\frac{1}{4}$ "	11"	6 $\frac{1}{2}$ "	6"	6"	0	7 $\frac{1}{2}$ "	9"	9"
<hr/>								
<hr/>								
6'	6'		6'	6'				
6"	6"		6 $\frac{1}{2}$ "	6"				
*	*	*	*	*	*	*	*	*

The witness testified that pole 181 "was the pole at McCoy's station"; and that pole 187 was the fourth pole from McCoy's station, and pole 187 is 3' 11" from the

track, "the nearest pole of all at that point," and "that pole is directly—is a plumb pole—very plumb, and all the rest of them are leaning from the track"; that "between pole 187 to 189 is some rock embankment, in behind pole—187 and 189," and that these poles are "right up to the embankment. The embankment does not come beyond the poles, but these poles could not be in any further without the embankment being removed." That the rock formation practically is between 187 and 189. That there is not a rock formation at pole 191; there is nothing there. * * * The rock is practically from about six feet east of 187 and then it runs about twelve or thirteen feet west of 189. * * * It slopes back. The total height would be about 12 or 14 feet," judged by the eye. That "this pole 187 is only 3' 11" from the track," and a straight pole. "All the poles around this location lean from the track so the wire won't pull, and this was practically plumb. That the poles on south of tracks lean about 8 or 10 inches, and those to the north, some of them a foot, *but this 187 is practically plumb.*" (R. 40-1).

Defendant's brief is in error in being under the impression that plaintiff ever contended there was a "cut" at place of injury. The photographs (pp. 48-9 hereof) show that on north side of the tracks there is this rock embankment for some distance, and on south side of tracks the ground slopes down from tracks to the river.

By the testimony of witness Herbert S. Gormley, although he was confused as to which was pole 187, it was shown that there was a pole 3 feet 11 inches from the track, west of McCoy's Station, and that this was pole 187, likewise measured at 3 feet 11 inches by the preceding witness. The witness exhibited a sketch, sectional view of a car, showing the distance from gauge line (in-

side edge of rail, and rail is $2\frac{1}{2}$ inches wide (R. 58), of rail to stanchion of car to be 17 inches, leaving 30 inches in the clear. The running-board on which conductor stood was, of course, outside the stanchion, was by said sketch $9\frac{1}{2}$ inches wide, thus leaving by said sketch a distance of only $20\frac{1}{2}$ inches from outside edge of running-board to pole 187.

It was admitted (R. 40, 55) that the position of pole 187 at time of trial had not been changed since the accident.

The evidence introduced by defendant showed, by the testimony of witness *Johnson*, that "the distance between the outer edge of the running-board * * * and the nearest point of the pole 187 was $19\frac{3}{4}$ inches," and from the stanchion to said pole $25\frac{1}{2}$ inches directly beneath the grab handle (R. 57). The grab handle is outside of stanchion, or closer to pole. Also when car is swaying towards pole in rapid motion around curve, the distance to pole is materially lessened. The distance is, of course, less at height of man's "rump," where decedent was struck, than at level of running-board, because the car tilted towards pole in taking the curve.

Witness Edwards, "by profession a Civil Engineer," testified that on that day of trial pole 187 was 3 feet 11 inches from the track (R. 55).

Space will not permit the setting out here of all the evidence showing the negligence of the defendant in placing and maintaining that pole 187, which was practically conceded at trial to have been the pole that struck decedent, and which is well established in the testimony as the pole that struck him. It is apparent from what is set out above, and from the additional evidence in the Record, and especially from a comparison of the measurements testified to by witness Philip F. Gormley (as per diagram, *supra*), that pole 187 was main-

tained negligently and carelessly too close to said tracks and passing cars. The poles on the south side of the tracks were 6 feet therefrom, and some of the poles on the north side, east of McCoy's, 7 and 8 feet away from the tracks, and poles 185 and 189 were more than half a foot further away from track than pole 187; and that all the poles leaned away from the tracks, except 187, which was practically plumb. It is evident that one reason defendant negligently placed and *maintained* said pole 187 thus negligently near passing cars was because there was a rock embankment there (R. 41), which could not be moved further away from the track without putting defendant, perhaps, to some little expense in removing said embankment, but which, however, *could have been removed, as it was on their property, as they owned their right of way* (R. 33-4). An inspection of said diagram discloses, where there was no embankment behind the poles, they are not maintained at such a dangerously negligent short distance from the track as was said pole 187. But, even if that was not the reason, the fact remains that said pole was carelessly and negligently placed and maintained dangerously near the passing car, and struck decedent, and thereby caused his injuries and death. In this connection, it must be remembered that a number of witnesses testified that cars on that line in general, and that particular car, at the time of injury to decedent, was running very fast and swaying from side to side, thus lessening the distance ($19\frac{3}{4}$ inches, according to defendant's own witness) between pole and car; and that a conductor in the exercise of his duties along the running board of a summer car generally has to swing out from handle to handle, in order to keep his balance, and does not walk along the board in a cramped-up, close-in position. He swings out from the board with the motion of the

car. All this should be taken into consideration, and it was the jury's right to pass upon the evidence in respect thereto, and to say whether or not it was negligent to place and maintain that pole 187 the distance it was from the tracks, under the circumstances under which decedent was required to perform his duties at the time of injury. The jury found it was negligence on the part of defendant.

It is respectfully submitted that that finding of fact by the jury, in regard to the negligent placing and maintaining by defendant of the pole in question in such close proximity to passing cars, under the circumstances as shown by the evidence in the case, should not be disturbed by a ruling that, as matter of law, furnishing 19 $\frac{3}{8}$ inches, or a less distance under some circumstances shown in the evidence, between car and pole, is reasonable care in furnishing a reasonably safe place to work.

In reply to the contention on p. 118 of defendant's brief, that "this case was not founded upon the allegation that a *particular pole* was negligently out of alignment with the other poles," it is only necessary to say that the evidence shows conclusively that it was pole No. 187 that struck decedent, which the evidence conclusively showed to be nearer to the track than any other pole, that said pole was one of the poles placed and maintained by defendant on its own right of way, and that the declaration did not allege that decedent was struck by all the poles, but that he was struck "by one pole" "too near" (R. 8); and, further, that no demurrer was interposed below to the declaration, and that the Bill of Exceptions is silent as to any objection on the score of "a particular pole" ever having been made in the trial Court.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "III (c)."

It is negligence for a railroad company to maintain structures in close proximity to its tracks, in violation of its duty to exercise reasonable care to provide a reasonably safe place to work for employees.

Defendant's brief, pp. 97, 120, states its eleventh, or "III (c)," Point to be that the trial Court should have sustained its motions to direct a verdict for defendant, because

"It is not negligence for an electric railway to maintain permanent and visible structures in close proximity to its tracks."

In stating its proposition under this Point, defendant's brief falls into inaccuracy, p. 121, in intimating that in the instant case the pole was "47" or 50" from the rail as the case may be, and 30" distant from the outside line" of the car, because we have just seen on p. 137 hereof that defendant's own expert witness, Johnson (R. 56-8) stated that it was only 19 $\frac{3}{8}$ inches from the running board to the pole with the car not in motion, and 3 ft. 11 in. from rail to the pole.

Hence the distance from running-board to pole was lessened considerably when the car was in rapid motion swerving or tilting toward the pole.

It would seem, however, that, by the statement of defendant, under this "III (c)" it is attempting to set up and bowl over "a man of straw," because plaintiff does not contend that it is negligence for a railroad to maintain permanent and visible structures in close proximity

to its tracks. That is a correct statement of the general law, but it by no means follows that if a railroad does more than that and maintains structures close to its tracks in violation of the duty it owes its employees to exercise reasonable care to provide a reasonably safe place to work, that that violation of said duty is not negligence, and it must respond in damages to an employee injured by such negligence.

In citing and quoting from the case of *Reese v. Phil. & Read. Ry. Co.*, 239 U. S., 463, defendant has misconceived the reasoning of the case, and overlooked that the facts therein are not similar, or even analogous to those in the case now before this Court.

In the *Reese* case, the defendant company did not have the right to select the manner, or distance, in which its tracks were laid at the place of the injury. They were laid close together, *but in a public street*, and they were laid "under an ordinance of the city (of Philadelphia) according to plans duly approved by its officials," and the street was "almost entirely occupied by them," and this Court said:

"Certainly the mere existence of such conditions is not enough to support an inference of negligence where, as here, it is necessary to utilize a public street."

Further, in that case, it was shown that "these conditions are obvious."

But, in the case at bar the condition complained of by plaintiff *was not obvious* (as will be shown under the question of "Assumption of Risk," pp. 142-51, 154-6 hereof). But the great difference is, that in the case at bar, by the evidence and by the admissions of defendant (R. 33, 34) that it owns its right of way,—its tracks and

poles are located not in a public street but on the defendant's own private property, and hence it was not restricted by any municipal ordinances in respect to not being allowed, or being obliged to obtain a permit, to originally locate, or later remove, said pole 187 further away from the track than it was located and maintained. It was its duty to exercise reasonable care in placing and maintaining that pole a reasonably safe distance from the track or car. The fact, that back of the pole was a rock formation, did not relieve it of its duty with respect to providing a reasonably safe place for its conductors to work. The rock embankment and pole were on its right of way, and it could have corrected the existing negligent conditions at any time it is so desired. It did not do so, and it should be held liable for the violation of its duty in the premises.

It is felt that the statement of the law upon which plaintiff relies, namely, that it is the duty of the master to exercise reasonable care in providing a reasonably safe place for its employees to work, is so well established, that it needs no citations of authorities to support it.

ARGUMENT IN REPLY TO DEFENDANT'S POINT "III (d)."

PLAINTIFF DID NOT ASSUME THE RISK.

Defendant's brief, pp. 97, 122, states its twelfth, or "III (d)," Point to be that the trial Court should have directed a verdict for defendant.

"Because whatever dangers resulted from the proximity of the poles to the track was inherent and obvious; the decedent had ample opportunity

to observe and appreciate the danger, and therefore assumed the risks resulting therefrom."

Defendant's brief (pp. 123-52) cites and quotes from many decisions, both State and Federal, and especially a great number of Massachusetts decisions. For years, it has been recognized universally that the Massachusetts Courts rule more strongly in favor of assumption of risk than do the great majority of other State Courts, and that many of their rulings in respect thereto are not sound doctrine in the Federal Courts. Moreover, we submit that the question of assumption of risk in an action under the Federal Employers' Liability Act should be decided by the Federal authorities, and not on the authority of Massachusetts and other State Courts.

THE RISK WAS NOT OBVIOUS.

It was uncontradicted in the testimony that pole 187, which struck decedent, was located on a curve, or bend, which the photographs produced at trial (stipulated to be produced on appeal, subject to consent of Court) (see appellant's brief, p. 111), show curves to the right, westbound, the direction in which decedent was bound at time of injury; and from the evidence we have seen that pole 187 was located but 3 feet 11 inches from the track at level of track and the adjoining poles on both the east and west and those south were located at greater or safer distances. See diagram, p. 135 hereof.

Therefore, because of this curve, the danger of the negligent closeness of that pole 187 was concealed, and was not as readily observable as it would have been if the tracks had been straight away, without a bend. Also, and for the same reason, the fact that this pole

was practically plumb, or perpendicular, while adjoining poles had a considerable lean away from the tracks (R. 40-1) was not as apparent. Decedent might have passed that pole a number of times while on a car, but, owing to that curve, would not ordinarily observe and appreciate the danger therefrom until his attention was called to it, or unless, perhaps, he passed that particular pole while on the running board of his car. He might have passed that pole a number of times while on his car, but, at the moment of passing, was not on the running board, but occupying his position on the rear platform. Conductors, of course, walk back and forth on the running board, but, common observation tells us, that most of their time is spent on the rear platform.

Defendant's brief, p. 123, cites that plaintiff's decedent "had been over this particular line 188 trips." An inspection of the evidence on this point, however (R. 43) shows that the 188 trips consisted of "94 round trips," "that the line over which he passed was a double track line, and on the return trip he would pass it on the opposite track." The Bill of Exceptions is silent as to the class of cars in which he made those 94 round trips, and it may well be that the larger part of them were made not by summer cars (open, with running-board along the side), but on closed cars, when he would not have the same opportunity for observation.

There is, however, *not one word of testimony in the Bill of Exceptions that he had ever passed that pole No. 187 while on the running-board of a car prior to the time of accident.* That the negligent condition of that pole and the danger of injury therefrom were not obvious is clearly established in the evidence.

In the case at bar, not one word of testimony was produced even tending to show that decedent's atten-

tion was ever called to the fact that pole 187 was closer to the tracks than the adjoining poles, or to the danger therefrom, or had noticed the same, nor was there any testimony that he had ever attempted to pass that pole while on the running board of a car until the night he was killed in so doing.

That there was danger in passing that pole, while on a running-board, is established, of course, by the fact that decedent was struck while so passing; but that the risk of danger therefrom was not such that an ordinarily prudent person who passed that pole on the platform, especially rear platform, or on the front platform, or inside the car, would have observed the defect and appreciated the danger while thus passing, is conclusively shown by the testimony of the motorman of the car, on which the decedent was acting as conductor when he was struck by the pole.

Owing to his duties, the motorman probably never passed that pole while on the running board; that the dangerous closeness of that pole to the running board, and the risk of danger therefrom to a person passing while on the running board, were not such a defect and risk as to be obvious to an ordinarily prudent person, and not even such as to be obvious to a motorman whose duties require him to always be constantly on the look-out ahead, is conclusively shown by the testimony of that motorman, the witness Wiser, brought out on cross-examination, while he was on the stand as a witness for defendant. He was asked:

"Q. Do you know the distance that pole is? You did not measure the distance that pole is from the track and put it in your report?

A. No, sir; I did not.

Q. YOU NEVER NOTICED THAT POLE, DID YOU?

A. NO, SIR; I NEVER DID.

Q. YOU NEVER KNEW ANYTHING OF IT BEFORE THIS TIME?

A. I HAVE SAW IT MANY A TIME.

* * *

Q. WAS THERE ANYTHING TO ATTRACT YOUR ATTENTION TO THAT POLE MORE THAN ANY OTHER POLE?

A. NO, SIR."

* * *

On redirect examination witness stated he had made that run out there '*right often.*'" (R. 51.)

That pole was located on the right-hand side of the west-bound track, and at a bend to the right in the track and lines of poles, and, therefore, each pole would come separately into the view of the motorman as he looked ahead, and yet there was nothing about that pole to attract *his* attention to it more than any other pole, although that pole 187 was only 3' 11" from the track—closer to the track than any pole testified to in this case.

Moreover, as evidencing that the defect and risk were both alike *not obvious*, there is the evidence of the witness Whalen who was the Sheriff for Montgomery Co., Md., and who was on the car at the time of the injury to decedent, the nearest person to him at the time, and who testified that he "went up there and saw the pole and the car * * * the next morning," and that the distance was measured there (R. 30), but "The witness was unable to indicate the distance. He said 'I guess it was the average distance of the poles away from the track'." Notwithstanding that at the scene of the injury, there was, as witness stated, "Some dis-

cussion about whether the pole that struck the man was closer or not compared with the other poles along there," when witness was on the stand, he said "I guess it was the average distance of the poles away from the track." (R. 31.) Notwithstanding that discussion was had with the pole in sight, and photographs being taken of the pole, etc., at the time of the discussion, and also measurements of the distance, when the witness testified, as a witness for defendant, he said on cross-examination:

"Q. * * * I am asking you about your statement that the pole could not have struck him unless he was away from the car.

A. I am not familiar with the pole. I could not state.

Q. You cannot say this would not have struck him unless he was on the running-board and holding on with both hands?

A. Why, I could not say he could not.

The witness could not say how far this pole was from the car, nor the average distance, though in passing he had seen the poles; that he could not state 'that man could not have been struck by this pole when on that car on that occasion without leaving the car or leaving hold of the stanchion,' unless the particular pole was unusually closer than the rest, *and he does not know whether it was or not.*

Q. You mean the average pole will not strike a man; that is what you mean, in other words?

A. That is what I mean; yes, sir." (R. 49-50.)

Surely, in view of this testimony of said two witnesses, Wiser and Whalen, produced by defendant, it cannot

fairly be said that the negligent proximity of the pole, or the risk of danger therefrom, were *obvious*. Their testimony is directly to the contrary.

Against that testimony of the motorman, Wiser, and of Whalen, and in the absence of *any evidence* in the Bill of Exceptions, showing the defect or risk were ever brought to the notice of, or noticed by, decedent, this Court is now asked by defendant to rule, as a matter of law, that the decedent assumed the risk of danger from that pole. Defendant makes its contention against the positive testimony of its own witnesses and employee.

Plaintiff's decedent, of course, assumed the risks of poles "normally and necessarily incident" to his occupation, or poles placed at normal distance from the track, but he did not assume "a risk of another sort, not naturally incident to the occupation," arising "out of the failure of" defendant "to exercise due care with respect to providing him a safe place to work." Defendant did not exercise due care in placing pole 187 only 3 feet 11 inches from the track, closer than any other pole, and on a curve where its dangerous closeness could not be readily observed and appreciated. The "defect and risk" of that pole (as being greater than that of poles, "normally and necessarily incident," to operating the cars), were not so "obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them;" *Seaboard A. L. v. Horton*, 233 U. S. 492.

The fact that decedent can not be presumed to have observed and appreciated the defect and risk, unless it is first shown that he passed that pole 187 on a running board, or had his attention directed thereto, is seen from the case of *Boston & M. R. Co. v. Brown*, 218 Fed.

625, decided by the Cir. Ct. App., First Circuit, in which it was held that, (Syllabus) :

"Where decedent, a railroad brakeman, was swept from the top of a car by a low bridge, and there was nothing to show that he has ever passed under it *on top* of a freight car, or had his attention directed to the width of the tell-tale erected before the bridge, he did not assume the risk as matter of law."

And the Court said:

"However often trains upon which he had acted as brakeman had been under the bridge, or however long he had worked as brakeman near it, there was nothing to show that he had ever passed under it *on the top* of a freight car, or had his attention directed to the width of the guard.
* * * If the passage beneath it was not reasonably safe under all the circumstances the railroad might still be negligent in continuing to permit the passage of trains beneath it while in such condition."

The case of Tuttle v. G. H. & M. R. Co., 122 U. S., 189, cited by defendant was speaking only in reference to what Seaboard A. L. v. Horton, 233 U. S., 492, designated as "such dangers as are normally and necessarily incident to the occupation," which are assumed by the employee. But the Horton case took care to point out:

"but risks of another sort, not naturally incident to the occupation, MAY ARISE OUT OF THE FAILURE OF THE EMPLOYER TO EXER-

CISE DUE CARE WITH RESPECT TO PROVIDING A SAFE PLACE OF WORK. * * * THESE THE EMPLOYEE IS NOT TREATED AS ASSUMING UNTIL HE BECOMES AWARE OF THE DEFECT OR DISREPAIR AND OF THE RISK ARISING FROM IT, UNLESS DEFECT AND RISK ALIKE ARE SO OBVIOUS THAT AN ORDINARILY PRUDENT MAN UNDER THE CIRCUMSTANCES WOULD HAVE OBSERVED AND APPRECIATED THEM. These distinctions have been recognized and applied in numerous decisions of this Court." (Capitalization ours.)

See *Kanawha & Mich. R. Co. v. Kerse*, 239 U. S., 576.

See *Chi. & N. W. R. Co. v. Bower*, 241 U. S. 470, saying:

"There was present, therefore, an extraordinary danger, not normally incident to plaintiff's employment; it was in its nature, LATENT, AND NOT OBVIOUS; *and there is no evidence in the record that plaintiff had received any warning or notice of the increased hazard attributable to his employer's negligence* * * *. Without this, he could not be held to have assumed the increased risk." (Italics and capitalization ours.)

See *Gila V. G. & N. R. Co. v. Hall*, 232 U. S. 94.

See *C. & O. R. Co. v. De Atley*, 241 U. S., 310.

See *T. & P. R. Co. v. Harvey*, 228 U. S. 319.

It is respectfully submitted that the trial Court's

action, in refusing to direct a verdict for defendant on the ground the decedent had assumed the risk, and in submitting that question of fact to be decided by the jury, was correct. Especially is this so, in view of the fact that the granted prayers (R. 61-2) and the Court's charge (R. 69-71) fully and fairly instructed the jury as to the law on the question of assumption of risk.

The question of Assumption of Risk is also discussed in this brief, pp. 154-6, 159-61, in relation to the prayers and evidence in the case.

ARGUMENT IN REPLY TO DEFENDANT'S POINTS "IV (a)" AND "IV (b)." AND ITS "PRAYER X."

*Plaintiff's Prayers and Court's Charge were Correct,
and Defendant's Prayers were incorrect, on the ques-
tions of*

NEGLIGENCE OF DEFENDANT, ASSUMPTION OF RISK BY PLAINTIFF, AND CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

Defendant's brief, pp. 152, 159, states its thirteenth and fourteenth, or "IV (a)" and "IV (b)," Points, to be, that, if there is any evidence on the above questions in the case sufficient to sustain a finding of the jury against defendant, it raised disputed questions of fact; and, therefore, the Court erred in instructing the jury peremptorily in regard thereto, by granting plaintiff's Prayers No. 3-A and 5, and in refusing defendant's Prayers III-A, VII and IX.

First, it may be said, in general, that the trial Court did not instruct the jury *peremptorily*, but acted in accordance with the decisions of this Court in other Employers' Liability Cases, in granting plaintiff's said prayers, in refusing defendant's said prayers, and in instructing the jury.

Second, it may be said in respect to said prayers and the Court's charge, that the defendant only noted very general exceptions thereto. (R. 68, 73.)

PLAINTIFF'S PRAYER NO. 3-A.

In regard to defendant's contention that this prayer (R. 67) permits a recovery upon a ground of negligence not stated in the declaration, viz., that the declaration stated all of the poles, and not one pole, were out of alignment, the same objection has been answered herein on p. 139 hereof.

The contention that the prayer is erroneous because of the use of the words "dangerously close," is not well taken, because it is apparent from a reading of the prayer that the jury understood that before they could find for plaintiff, it was necessary for them to first find that the defendant did not exercise *reasonable care* in locating and placing the pole, and that the injury was due to defendant's failure to exercise reasonable care in respect to locating said pole. In other words, the jury understood, from the very terms of the prayer, that before they could return a verdict for plaintiff on account of the dangerous position of the pole, they would *first* have to find that that danger was due and only due to plaintiff having neglected and failed in his "*duty of exercising reasonable care in providing a place reasonably safe and secure*" for decedent. Further, the prayer, in addition to qualifying the danger as danger due to

defendant's negligence, also further qualified the instruction to the jury by telling them that if the danger was so obvious that "an ordinarily prudent person, under the circumstances, would have appreciated it," the plaintiff was not entitled to recover. Furthermore, the Court gave a charge fairly covering all features of the case, correctly, so there could have been no possible misunderstanding on the part of the jury. Moreover, the Bill of Exceptions certifies that the only objection and exceptions preserved therein in respect to said prayer are the very general ones noted at pp. 68 and 73 of Record.

In regard to the further contention of defendant made to said plaintiff's prayer No. 3-A, based on "proximate cause" of injury being some careless act of decedent, we quote the following language taken from the opinion in the case of the Grand Trunk W. R. Co. v. Lindsay, 233 U. S., 542:

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted, in whole or *in part*, from defendant's negligence, the statute would be nullified by calling plaintiff's act *the proximate cause*, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same by whatever name called."

In regard to defendant's contention that the prayer disregarded defendant's evidence showing actual knowledge of decedent as to the location of the pole, and that

the cause of the accident was decedent losing his foothold, the last sentence of the prayer answers the first objection, and also it was the province of the jury to pass upon the evidence, and also there was no evidence of *actual* knowledge on the part of decedent; and the second objection violates the provision of Sec. 3 of the Act, which provides that contributory negligence shall not be a bar to the action; and is also answered in our reply to appellant's Point "III (a)," pp. 124-9 hereof, and is also covered by appellant's granted other prayers as incorporated in the Court's charge.

In regard to the contention that it applies the Federal Employers' Liability Law to a "street-car" employee, we say that the question was never raised below; and also see our answer thereto; both on the merits, and that the objection was not raised below, under our reply to appellant's Point "I (a)" and pp. 20-55 hereof.

PLAINTIFF'S PRAYER NO. 5.

Defendant's brief, p. 159, complains of the language of Plaintiff's Prayer No. 5 (R. 612). Defendant's brief in stating that the prayer "is erroneous in announcing that the servant only assumes such dangers as are normally and necessarily incident to the occupation," is in reality complaining of the language of this Court in the Horton case, 233 U. S., 492, because the wording of that prayer follows *very closely* the language of the opinion in that case, as follows:

Plaintiff's Prayer No. 5: Opinion of Horton case,
supra:

* * * * *

Assumption of risk is not the same as contributory negligence.

Contributory negligence involves the notion of some fault or breach of duty on the part of the employee.

On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee.

And in this case you are instructed that the deceased only assumed such dangers as were normally and necessarily incident to his occupation; but that he did not assume risks of another sort, not naturally incident to his occupation and arising out of any failure of the defendant company to exercise due care with respect to placing the trolley pole a safe distance from the running board of the car. Risks of this sort, arising out of any negligence of the defendant, the jury would not be justified in finding were assumed by

Contributory negligence involves the notion of some fault or breach of duty on the part of the employee.

* * * * *

On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee.

* * * * *

Such dangers as were normally and necessarily incident to the occupation.

* * *

But risks of another sort, not naturally incident to the occupation may arise out of any failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk

the deceased unless they first find that any negligence of the defendant in placing that particular pole the distance it was from the running board, and also the risk of danger therefrom to a person passing while on that running board, under the circumstances of this case, were both alike known to the deceased, or were both so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

On the question of assumption of risk, we submit that the above-quoted prayer, under the facts in the case as disclosed by the evidence, presents a very fair presentation of the subject to the jury. This prayer was later incorporated in the Court's charge (R. 70-1), together with other instructions of the subject. It is submitted that the Court's charge, being in accordance with the decisions of this Court, and fully and fairly covering the subject of assumption of risk, it was not error for the Court to refuse to charge the jury in the exact language of any of defendant's rejected prayers.

Also see *Seaboard Air Line v. Padgett*, 236 U. S., 668.

Also see cases cited under assumption of risk hereinbefore, in reference to defendant's request for a directed verdict on that score; pp. 142-51 hereof.

DEFENDANT'S PRAYER III-A.

Defendant's Prayer III-A (R. 67) is, on one phase, predicated on the erroneous assumption that the "proximate cause" of the injury was some careless act of decedent, which may be conclusively answered by quotation from the Lindsay case, 233 U. S., 542; p. 153 hereof.

Also the prayer is grossly improper in view of section 3 of the Employers' Liability Act, providing contributory negligence of plaintiff shall be an absolute bar of the action. In this respect, see our reply under

DEFENDANT'S PRAYER NO. VII.

To grant said Defendant's Prayer No. VII (R. 65) would be to abrogate the effect of the Employers' Liability Act, since the effect of that Prayer would have been to lead the jury to believe, that, if they found plaintiff's decedent was guilty of contributory negligence, there could be no recovery by appellee; an instruction directly contrary to the express provision of Section 3 of the Act, that:

"The fact that the employee may have been guilty of contributory negligence shall not bar a recovery."

While appellant noted a *general* exception (R. 66, 68-9, 73-4) to the granting of Plaintiff's Prayer No. 4, (R. 61), which correctly sets forth that:

"such contributory negligence is not to defeat the plaintiff's right to a recovery altogether, but the damages shall be diminished by the jury in

proportion to the amount of negligence attributable to the deceased;" etc.; (N. & W. R. Co. v. Earnest, 229 U. S., 114) ;

and

"that the burden of proving the contributory negligence of the deceased is on the defendant;" (Ry. Co. v. White, 238 U. S., 507),

and the Court so charged the jury (R. 69-70), and while defendant assigned as error: "9. The Court erred in granting the plaintiff's prayer No. 4" (R. 13), nowhere does defendant's brief in its statements of its "Points" or "errors which will be relied on," or in its arguments thereon, make any *direct* attack on the merits of plaintiff's said Prayer No. 4. It does attempt to make an indirect attack, by erroneously asserting that the granting of said Prayer 4 raised the questions of whether or not defendant was a railroad (its brief, 17, 29, 43), and whether or not defendant was a freight carrier. Those are the only objections of defendant's brief to Plaintiff's granted Prayer No. 4; and, therefore, all other objections thereto, *especially to the merits*, must be considered as abandoned by defendant. This places defendant in the inconsistent position that, although it concedes the correctness of the principles of Plaintiff's Prayer No. 4, it is contending for the grantal of its own Prayers Nos. III-A and VII—directly in conflict with what it has conceded to be correct.

Defendant could not do otherwise than to concede Plaintiff's Prayer No. 4 correctly instructs the jury on the question of contributory negligence, as its language is taken, almost verbatim, from

Norfolk & W. R. Co. v. Earnest, 229 U. S., 114.

Seaboard A. L. v. Tilghman, 237 U. S., 499.

Grand Trunk W. Ry. Co. v. Lindsay, 233 U. S., 42.

Cent. Vt. Ry. v. White, 238 U. S., 507.

DEFENDANT'S PRAYER NO. IX.

Defendant's brief claims that its prayer No. IX (R. 65), is supported by the case of *Jacobs v. So. Ry.*, 241 U. S., 229. In the *Jacobs* case, however, the facts differ essentially from the facts in the case at bar, for in the *Jacobs* case the employee had actually known for some time of the existence of the cinder pile that caused his injuries. He ran upon the cinder pile, which was close to tracks and obvious, carrying a can of water, in the attempt to board a moving train. Whereupon the cinders gave way under his feet, and caused him to go under the moving train. Whereas, in the case at bar there is absolutely no evidence that the decedent ever knew of the existence of that particular pole or of its dangerous proximity to the track and passing cars, or ever had the means of knowledge of the said proximity or the danger therefrom. Nor, in the case at bar, is there any evidence that decedent had ever passed that pole as conductor of a summer or open car, or that he had ever been on the running board of a summer car while passing that pole, or had ever in any manner had his attention directed to, or attracted by, the danger of the nearness of the pole in question. Moreover, the evidence in the case at bar conclusively shows that the dangerous proximity of the pole in question was not obvious, because both the motorman of decedent's car, who testified he had made that run out there "right often," and the witness Whalen, who testified he

went there for the purpose of seeing measurements and photographs made of that pole, both were unable to say there was anything about the pole to attract their attention more than any other pole, and they did not know and could not tell whether it was or was not closer to the track than the normal or average pole. Furthermore, the plaintiff in the Jacobs case, contended that the common law rule on assumption of risk had been abolished by the Employers' Liability Act, and that the Horton case, *supra*, should be overruled. Plaintiff in the case at bar makes no such contention here, and made no such contention in the lower Courts. On the contrary, the plaintiff in the case at bar had the trial Court instruct the jury as to the law of assumption of risk as laid down in the Horton case, *supra*; see plaintiff's Prayer No. 5 (R. 61-2).

The error in Defendant's said Prayer IX is that being taken, as defendant's brief admits, from the prayer in the Jacobs case, *supra*, it is based on the facts in the Jacobs case and not on the facts as disclosed by the evidence in the case at bar. The condition was an *obvious* one in the Jacobs case, and known to the employee for sometime prior to the injury. The prayer is also defective when applied to the case at bar, because it erroneously presupposes (and defendant's other prayers in the instant case follow the same error), that decedent should be presumed to have had knowledge of the dangerous proximity of the *one* pole, No. 187, simply because he had been passing *other poles* placed at safer distances, and had made no complaint; and disregards the entire lack of evidence to support the assumption of knowledge, actual or presumptive, on the part of decedent; and disregards all the evidence (pp. 145-7 hereof), showing that an ordinarily prudent man (not even the motorman, watching out ahead all the time),

unless his attention had been specifically directed to the pole, would not have observed the closeness of the pole and have appreciated the danger therefrom. See argument and authorities (pp. 142-51, 154-56 hereof), under "Assumption of Risk."

DEFENDANT'S PRAYER No. IV.

The vice of the Defendant's Prayer No. IV (R. 64) is that it presumes the existence of what is denied by the evidence in the case. It presumes that the fact that pole No. 187 was nearer to the track than the other poles was an *obvious* fact which is directly contrary to all the evidence in the case on that point. It presumes that the "condition" of the dangerous proximity of the pole in question was a condition with which decedent would have become familiar, that is, appreciated, by remaining in the employ of the company on the same run as that on which he was killed. This is directly contrary to the evidence. It also would have misled the jury on the question of contributory negligence. It is also incorrect because it makes knowledge of a "condition," that is, of a defect, or deficiency, or a physical condition, the sole test of holding an employee should be held to assume the risk, which is in violation of the Horton case, *supra*, which held that defect and risk both alike must be so obvious that an ordinarily prudent person would have both observed and appreciated them. See pp. 142-51, 154-56 hereof, under "Assumption of Risk."

DEFENDANT'S PRAYER NO. X.

Defendant's brief, p. 161, in a few lines contends that the trial Court should have granted its Prayer X (R. 66). The contention may be summarily disposed

of by saying that, as the prayer attempted to limit the recovery in the case at bar to damages only for "pecuniary injuries actually * * * suffered by the next of kin of decedent," thereby denying plaintiff's right to recover for decedent's injuries in the same action, the prayer was inherently improper, and the trial Justice was correct in refusing it. See pp. 60-9 hereof, in reference to claim for conscious pain and suffering being recoverable in same action for pecuniary loss to next of kin.

CONCLUSION

It is respectfully submitted:

That Plaintiff's Motion to Dismiss the Writ of Error herein should be sustained, and the writ dismissed;

That Defendant's Petition for Certiorari should be denied;

That, in any event, on the Merits of the Case, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for Respondent and Defendant in Error.

WASHINGTON RAILWAY & ELECTRIC COMPANY
v. SCALA, ADMINISTRATRIX OF SCALA.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

No. 826. Argued May 8, 1917.—Decided June 11, 1917.

The court has jurisdiction by writ of error to review this judgment of the Court of Appeals of the District of Columbia in a case arising under the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, as amended April 5, 1910, 36 Stat. 291.

Defendant was incorporated as an ordinary railway company (as distinguished from a street railway company), with full powers of eminent domain, and owned a line of electric railway built largely on a private right of way from a terminus in the District of Columbia to a terminus in Maryland, which it operated as a common carrier of passengers for hire between those termini. *Held* that it came within the Federal Employers' Liability Act.

If the declaration alleges that the injuries charged to defendant's negligence caused plaintiff's intestate to "suffer intense pain," an amendment at trial adding that deceased endured "conscious pain and suffering" is but an elaboration of the existing statement, and is not open to the objection that it introduces a new cause of action barred by the two year limitation of the Federal Employers' Liability Act.

Maintaining a trolley pole closer to the track than others on the line, and so close that a conductor can not safely discharge his duties, affords ample ground for a finding of negligence by the jury.

45 App. D. C. 484, affirmed.

THE case is stated in the opinion.

Mr. John S. Barbour, for plaintiff in error, in support of the jurisdiction, contended that the various sections of the Employers' Liability Act of 1908, with the amendments of 1910, were meant to constitute a single law operative throughout the Union, as is apparent upon their perusal.

Section 2 cannot be considered and administered alone any more than can § 1. The other sections which co-ordinate with both are general in their nature and operation, cannot be construed finally by one authority for the District of Columbia and by another for the country at large, and are not the result of the exercise of the power of Congress to govern the District but come from its power over interstate commerce. The construction of the other sections is involved in this case. Furthermore, plaintiff's cause of action was based on § 1 as shown by the allegations of the surviving counts of the declaration and by the position assumed by her counsel in the court below. Even if § 2, taken by itself, could be treated as a local law, the remaining sections are nevertheless parts of a general law. *American Security & Trust Co. v. District of Columbia*, 224 U. S. 491; *Washington, Alexandria & Mt. Vernon Ry. Co. v. Downey*, 236 U. S. 190; *McGowan v. Parish*, 228 U. S. 312.

It must be remembered that, in the *Downey Case*, while the liability sustained rested purely upon the plenary local power of Congress, the act was held applicable to the case of an employee engaged in interstate commerce because, as a local statute, it governed in the absence of legislation of a general character governing the subject.

Appellant as a matter of law was not to be held a common carrier by railroad within the meaning of § 1 of the Act of 1908. Its charter (29 Stat. 246), which was in evidence, expressly forbids it from operating steam cars, locomotives, or passenger or other cars for steam railways. Other evidence also showed that it was chartered as a street railway company only and did business only as such. It carried no freight.

The rule of construction is that, unless from the context a different meaning appears, the term "common carrier" applies only to carriers of property and not to carriers of persons merely. *New York Central & Hudson River*

R. R. Co. v. Shirley, 120 N. Y. Supp. 192; *Brewer v. Railway Company*, 45 Hun, 595; *Central Railroad of Georgia v. Lippman*, 110 Georgia, 665; *Bouvier*; *Hutchison on Carriers*, § 47; *Greenleaf on Evidence*, vol. 2, § 211.

Assuming that a suburban street railway company operated by electricity and carrying passengers only is a common carrier, still it is not a "railroad" within the meaning of the act. *McLeod v. Chicago &c. Ry. Co.*, 125 Iowa, 270; *Fallon v. West End Street Ry. Co.*, 171 Massachusetts, 249; *Lundquist v. Duluth Street Ry. Co.*, 65 Minnesota, 387; *Funk v. St. Paul Street Ry. Co.*, 61 Minnesota, 435; *Sams v. St. Louis & Merrimac R. R. Co.*, 174 Missouri, 53; *Godfrey v. St. Louis Tourist Co.*, 107 Missouri, 193; *Johnson v. Metropolitan Street Ry. Co.*, 104 Mo. App. 588; *Riley v. Galveston City Ry. Co.*, 13 Tex. Civ. App. 247; *Norfolk Traction Co. v. Ellington*, 108 Virginia, 245. See *Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission*, 230 U. S. 324; *Hughes v. Indiana Traction Co.* (Indiana), 105 N. E. Rep. 537.

Omaha & Council Bluffs St. Ry. Co. v. Interstate Commerce Commission, makes plain that the facts that a street railway does a suburban as well as an urban business, is operated by electricity instead of horse power and operates in part over a private right of way, do not give it the character of a "railroad" within these acts. *United States v. Baltimore and Ohio S. W. Ry. Co.*, 226 U. S. 14; *Kansas City &c. Ry. Co. v. McAdow*, 240 U. S. 51; *Spokane &c. Ry. Co. v. United States*, 241 U. S. 344, and *Same v. Campbell*, *id.* 497, all had to do with roads operating between cities, and carrying both passengers and freight after the manner of steam railroads, and competing with them—unlike the road of the plaintiff in error.

At most the question of the character of appellant was one for the jury and not for peremptory instruction.

The trial court erred in allowing a new cause of action to be introduced by amendment after the evidence had

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all been taken and the witnesses discharged, especially one which was already barred by the limitation of the statute under which such cause of action was permitted to survive. The right of action for the conscious pain and suffering of the deceased based wholly on the Act of 1908, as amended in 1910, was not counted on nor damages claimed under it in the declaration. The distinction between such a cause and the cause relied on prior to the amendment is clearly shown in *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59; *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U. S. 648; *Garrett v. Louisville & Nashville R. R. Co.*, 235 U. S. 308; *Gt. Northern Ry. Co. v. Capital Trust Co.*, 242 U. S. 144. Under the declaration as originally drawn there was but a single cause of action asserted, namely, the action for pecuniary loss and damage resulting to the parents by reason of the untimely death of their son. The pleading could not justify a recovery under his surviving right of action. See *Hurst v. Detroit City Railway*, 84 Michigan, 539. It is contrary to the settled law to permit a cause of action which has been barred by limitation, and which is not even defectively pleaded, to be revived by an amendment relating back to the beginning of the action. 25 Cyc. 1308, 31 *id.* 413; *Nelson v. First Natl. Bank*, 139 Alabama, 578; *Mohr v. Lemle*, 69 Alabama, 180; *Whalen v. Gordon*, 95 Fed. Rep. 305; *Schulze v. Fox*, 53 Maryland, 37.

Seaboard Air Line Ry. v. Renn, 241 U. S. 290; *Illinois Surety Co. v. Peeler*, 240 U. S. 214, and *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, are to be distinguished as cases in which the amendments merely extended or amplified statements of causes of action already set up.

The plaintiff in error did not waive its right to plead the statute of limitations to the amended declaration by its failure to object to the first amendment. The court below disposed of this objection in its opinion, citing *Union*